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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARIO BIAGGI and MEADE ESPOSITO,

Petitioners,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Whether The Court Of Appeals And The District Court Properly Applied This Court's Holding In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) To The Facts In This Case?

II. Whether The Court Of Appeals Misinterpreted The "Official Act" Requirement Of 18 U.S.C. §201?

III. Whether Petitioner Biaggi's Travel Act Conviction Violates The Speech Or Debate Clause Of The Constitution?

IV. Whether The Court Of Appeals Misinterpreted The Travel Act In Holding That A Gratuity Offense May Be A Predicate Thereof?

V. Whether Certiorari Should Be Granted To Resolve The Definition Of A "Pending Grand Jury?"

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Mario Biaggi and Meade Esposito petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion in the Court of Appeals is reprinted in the Appendix at pages AA 1-40.[1] The order of the Court of Appeals denying petitioners' petition for rehearing appears in the Appendix at page AB 1. The order of the Court of Appeals granting petitioner Biaggi's motion to stay the issuance of the mandate

[1] References to the Appendix to this Petition are preceded by "AA," "AB," "AC," "AD," or "AE," followed by the page number.

for thirty days pending application to this Court for a writ of certiorari appears in the Appendix at pages AC 1-3. The opinions of the United States District Court for the Eastern District of New York (Weinstein, then-Ch.J.) denying petitioners' motions for a new trial because of the prosecution's impermissible, discriminatory use of its peremptory jury challenges and to set aside the jury's verdict convicting them of violations of the Travel Act (18 U.S.C. §1952) appear in the Appendix at pages AD 1-22 and AE 1-10, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 1, 1988. A timely petition for rehearing was denied on October 6, 1988. On October 19, 1988, the Court of Appeals granted petitioner Biaggi's motion to stay the issuance of the mandate for thirty days pending application to this Court for a writ of certiorari. The jurisdiction of the Court is invoked pursuant to Title 28, U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Article 1, Section 6, Clause 1 of the United States Constitution:

> "[F]or any speech or Debate in either house, [the Senators and Representatives] shall not be questioned in any other place."

The Fifth Amendment of the United States Constitution:

> "[No person shall] be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment of the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Fourteenth Amendment of the United States Constitution:

> "[No State shall] deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Title 18, U.S.C. §201, in pertinent part, provides:

"(a) For the purpose of this section –

(1) the term 'public official' means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

* * * *

(3) the term 'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

* * * *

(c) Whoever –

(1) otherwise than as provided by law for the proper discharge of official duty –

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person; shall be fined under this title or imprisoned for not more than two years, or both."

Title 18, U.S.C. §1503, in pertinent part, provides:

"Whoever. . .corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18, U.S.C. §1952, in pertinent part, provides:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to –

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Acts), or prostitution offenses in violation of the laws of the State in

which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title."

STATEMENT OF THE CASE

The petitioners were convicted after a trial by jury in the United States District Court for the Eastern District of New York (Weinstein, then-Ch.J.) of offering and accepting an unlawful gratuity in violation of former 18 U.S.C. §§201(f) and (g), respectively [now 18 U.S.C. §§201(c)(1)(A) and (c)(1)(B)], and violating the Travel Act, 18 U.S.C. §§1952 and 2. Petitioner Biaggi was also convicted of obstructing a grand jury investigation in violation of 18 U.S.C. §1503.[2] Biaggi was sentenced to concurrent two and 1/2-year and one-year and a day prison terms on the obstruction, gratuity and Travel Act counts and was fined a total of $500,000. Esposito was sentenced to two years probation, 500 hours of community service and fines totalling $500,000. On August 1, 1988, the United States Court of Appeals for the Second Circuit affirmed the convictions (AA. 1-40) and on October 6, 1988, the Court denied petitioners' application for rehearing. The Court of Appeals has stayed issuance of the mandate and petitioner Biaggi remains on bail pending this petition for a writ of certiorari.

Mario Biaggi had a distinguished career, first as the most decorated police officer in New York City's history, and then, from 1968-1988, as the Representative for the 19th Congressional District in the Bronx. Similarly, his co-defendant, Meade Esposito, had a long career in public service and from 1962 until he retired in 1984, served as Chairman of the Democratic Party in Brooklyn. Biaggi and Esposito are unquestionably longstanding political and personal friends.

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[2] Petitioners were acquitted of charges of conspiring to violate section 201 of Title 18, U.S.C. in violation of 18 U.S.C. §371, and bribery in violation of 18 U.S.C. §201(b).

In the fall of 1985, the Organized Crime Strike Force in Brooklyn initiated extensive electronic surveillance directed at Esposito. The FBI planted bugging devices in his offices at two companies, Beaumont Printing Corp. ("Beaumont") and Serres, Visone, and Rice, Inc. ("SVR"), and tapped various phones in his home (TR. 616-624).[3] This electronic surveillance disclosed that shortly before Christmas 1985, Esposito made arrangements for Biaggi and Barbara Barlow to visit the Bonaventure Spa in Florida (GXS 19-21). It also revealed that Biaggi and Esposito discussed many topics of mutual, political interest, including the welfare of Coastal Dry Dock and Repair Corp. ("Coastal"), then the primary tenant of the Brooklyn Navy Yard and one of the major industrial employers in Brooklyn. Because Esposito encouraged Biaggi to help Coastal[4] in a dispute it had with the City of New York and during the same time period arranged for him to visit a Florida spa, the government theorized in its indictment that Esposito had unlawfully rewarded Biaggi for services rendered to Coastal (A. 39-58).

The government began its case by proving that Esposito's insurance firm, SVR, had a substantial financial relationship with Coastal and that Coastal, primarily because of high utility rate costs imposed by its landlord, the Brooklyn Navy Yard Development Corp. ("BNYDC"), a public corporation owned by New York City, had difficulty competing in the cut throat business of obtaining ship repair contacts from the Navy (TR. 96-141; 185-210; 226-272; 396-443). Also, at the same time, Coastal was experiencing difficulty collecting payments due on contracts it had already performed for the Navy (TR. 396-443). All this apparently jeopardized Coastal's future, and, according to the government, SVR's continuing ability to sell Coastal insurance.

The prosecution contended that this led Esposito to undertake substantial efforts to save Coastal, including enlisting the help of bankers to obtain financing for it (*e.g.* GX 26). He also

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[3] References preceded by "TR" are to the Trial Transcript; by "A" to the Appendix submitted to the Court of Appeals and by "GX" and "DX" to the government and defense exhibits, respectively.

[4] Unbeknownst to Biaggi, Esposito's insurance firm, SVR, was Coastal's insurance broker (See GX 48).

recruited various politicians like Biaggi, New York Senator Alfonse D'Amato and Brooklyn Borough President Howard Golden to speak to city and federal officials on Coastal's behalf (*e.g.* GX 10).

City officials, including former Deputy Mayor Kenneth Lipper and Deputy Mayor Alair Townsend, and Senator D'Amato testified about the efforts made by Biaggi and others to aid Coastal (TR. 327-363; 503-531; 776-806). Voluminous correspondence, telephone call messages, diary entries and other records were introduced documenting Biaggi's endeavors (GX 119, *Id.*).[5]

In mid-December 1985, Meade Esposito made arrangements for Biaggi and Barbara Barlow to vacation at the Bonaventure Spa in Florida in late December of 1985 and early January of 1986 (GX 19-21). Ms. Barlow testified that she and Biaggi had visited the spa then and during approximately the same time period the previous year (TR. 889-917).[6] Robert Blancato, then-Congressman Biaggi's chief administrative aide, testified that both in 1984/85 and 1985/86 Biaggi's trips were related to various congressional matters and prior arrangements for meetings and the like were made by the Congressman's staff (TR. 1195-1201).

On June 2, 1986, two agents of the FBI interviewed Biaggi at his Congressional office in the Bronx (TR. 1533-1534). He was questioned regarding the spa trips and Coastal and he freely admitted that he had taken the vacations and that he had worked to solve Coastal's problems with the City (TR. 1534-1540). Although at first he was reluctant to name the person who had paid the spa expenses, he ultimately identified Meade Esposito (TR. 1535, 1544). Later that morning, he called Esposito and they discussed what the FBI had inquired about (GX 48).

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[5] Evidence introduced primarily through Robert Blancato, the then-Congressman's chief administrative aide, demonstrated that his efforts on behalf of Coastal began as far back as 1982, when he tried to help Coastal win the contract to refit the battleship "IOWA" (TR. 1386-1388).

[6] The arrangements for both trips were made in a similar fashion; however, while Esposito's printing firm, Beaumont, paid the spa expenses for the 1984/85 trip, Biaggi paid for the 1985/86 trip.

REASONS FOR GRANTING THE WRIT

I.

NEITHER THE COURT OF APPEALS NOR THE DISTRICT COURT PROPERLY APPLIED THIS COURT'S HOLDING IN *BATSON v. KENTUCKY*, 476 U.S. 79, 106 S.Ct. 1712 (1986) TO THE FACTS IN THIS CASE.

The petitioners met their burden of establishing that the prosecution had systematically exercised its peremptory challenges to exclude members of petitioners' cognizable racial group (Italian-Americans) from the jury. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1722-1723 (1986). Thereafter, the prosecutors were required, in a post-trial hearing, to advance credible, racially neutral reasons for the exercise of these challenges. *Id.* The district court held and the Court of Appeals affirmed that the prosecution had rebutted the defendants' *prima facie* case of discrimination by coming forward with "sufficient 'neutral, specific and reasonable explanations substantiating legitimate exclusions of each of the venire members removed. . . .' " (AA. 14). In so holding, the Court of Appeals did not examine and make specific findings with regard to each explanation offered by the prosecutors for each juror peremptorily challenged. This Court's opinion in *Batson* strongly implies, but does not specifically hold, that the court must make such specific findings with regard to every racially suspect challenge exercised by the prosecution because even a single improperly exercised challenge could constitute a violation of the equal protection clause.

> " 'A single invidiously discriminatory governmental act' is not immunized by the absence of such discrimination in the making of other comparable decisions.' (citation omitted) For evidentiary requirements to dictate that 'several must suffer discrimination' before one could object (citation omitted) would be inconsistent with the promise of equal protection to all."

Batson v. Kentucky, 476 U.S. at ____, 106 S.Ct. at 1722.

Accordingly, this Court should grant certiorari to amplify its opinion in *Batson* to require that each reason advanced by the prosecution for exercising one of its peremptory challenges meets the test of "articulat[ing] a neutral explanation related to the particular case to be tried." *Batson v. Kentucky*, 476 U.S. at ____, 106 S.Ct. at 1723. Without such a requirement, petitioners submit that the *Batson* holding can easily be evaded since individual equal protection violations could be camouflaged by blanket justifications or findings that most or all of the challenges had been properly exercised. Moreover, without such specific findings it is impossible for there to be effective appellate review.

For example, without any analysis, the Court of Appeals affirmed because, "the government had excused several of the prospective jurors because they or their spouses held positions that might have led them to identify with one of the defendants...." (AA. 14-15). Presumably, this reasoning applied to prospective juror Angela DiSanto, who the prosecutor struck because she belonged to the Mutual Aid Society, an "Italian" organization. However, since there was no further inquiry during *voir dire* into the purposes for or activities of this organization, it is impossible to determine that this peremptory strike was used because Ms. DiSanto "held [a position] that might have led her to identify with one of the defendants." And, even worse, the Court of Appeals may not have specifically considered Ms. DiSanto's situation at all, since its use of the word "position" may not refer to membership in an organization. Thus, the prosecutor's explanation and the district court's findings may not have been reviewed by the Court of Appeals because the only other category of "explanations" mentioned by the Court related to jurors who were disrespectful or discourteous (AA. 15), an explanation inapplicable to Ms. DiSanto.

Because of the importance of the *Batson* decision in insuring the integrity and fairness of the judicial process, this Court should grant certiorari to amplify its opinion and prevent further circumventions of *Batson* such as those which occurred here.

II.

THE COURT OF APPEALS MISINTERPRETED THE "OFFICIAL ACT" REQUIREMENT OF 18 U.S.C. §201 AND THERE IS A SPLIT AMONG THE CIRCUITS AS TO ITS PROPER CONSTRUCTION

The Court of Appeals rejected the petitioners' argument that their convictions for offering and accepting an unlawful gratuity could not stand because the indictment failed to charge and the proof at trial failed to establish that their efforts to influence the decisions of certain New York City officials related to matters which "may by law be brought before any public official in such official's official capacity. . . ." 18 U.S.C. § 201(a)(3). In so doing, the Court of Appeals apparently held that a New York City official is a "public official" within the meaning of section 201. This conclusion misapprehends the statute, its legislative history and the case law which has interpreted it. Also, the Court's holding is squarely at odds with the D.C. Circuit rule enunciated in *United States v. Muntain*, 610 F.2d 964 (D.C. Cir. 1979).

Section 201(a)(1) defines a "public official" as a "Member of Congress," or any one of a number of other enumerated persons who are all either clearly related to or employed by the federal government. Thus, when later in section 201(a)(3) Congress defines "official act" as a "decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before *any public official*, in such official's official capacity, or in such official's place of trust or profit," the conclusion is ineluctable that the term "public official" as used there refers to those specifically enumerated in section 201(a)(1) (emphasis added).[7] Since then-Congressman Biaggi was the only "public official" referred to in the indictment or by the evidence at trial, it was incumbent upon the government to prove that there was some "decision or action" in a matter legally pending before then-Congressman Biaggi in his "official capacity" in connection with which the gratuity was offered.

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[7] Significantly, all of the "officials" enumerated in section 201(a)(1) have some sort of decision-making responsibility.

This was never the government's theory, nor did it offer any such proof. The indictment clearly charged that the "decisions and actions" which were to be influenced were those of the "Mayor, Deputy Mayor, and other officials and employees of the City of New York. . . ." (A. 56) The proof at trial supported this theory by establishing Congressman Biaggi's efforts to influence the decisions or actions of various city officials. (AA. 6-9). And the Court of Appeals concluded, "we see no basis for ruling that a congressman's official acts. . . may not include efforts that are directed to local rather than federal officials" (AA. 22)

This is clearly beside the point. The crux of the gratuity offense is the influencing of decisions that a public official makes in his "official capacity." Since the only "public official" in this case is Congressman Biaggi, it was necessary for the government to show that the gratuities related to a decision he made or could have made on a matter then pending before him. There was no such proof. Congressman Biaggi had no decision-making responsibility with regard to any of the issues which arose out of the dispute between Coastal and New York City. Moreover, there was no showing that any of these matters ever could "by law be brought before [Congressman Biaggi], in his official capacity or in his place of trust or profit." 18 U.S.C. §201(a)(3).

Finally, the Court of Appeals' holding that the statute can be violated by proving "efforts that are directed to local rather than federal officials" (AA. 22) conflicts with that of the D.C. Circuit in *United States v. Muntain, supra*. There the Court reversed the conviction of an Assistant to the Secretary for Labor Relations for HUD, who had accepted a gratuity purportedly to influence his decision regarding group auto insurance for labor union officials, a matter not within HUD's jurisdiction. The D.C. Circuit held:

> It is the corruption of official decisions through the misuse of influence in governmental decision-making which the bribery statute makes criminal.
>
> In the instant case, there was no evidence that Muntain's meetings with labor officials to discuss and promote group automobile insurance involved a subject

> which could be brought before Muntain — or, for that matter, anyone else at HUD — in an official capacity. There was, therefore, no apparent danger that the receipt of gratuities. . . in connection with the group automobile insurance scheme would induce Muntain to act improperly in deciding a HUD-related matter. Accordingly, 18 U.S.C. §201(g) simply does not apply.

United States v. Muntain, 610 F.2d at 968.

This ruling obviously conflicts with the one now clearly enunciated by the Second Circuit that a gratuity can be offered to influence the "official act" a decision of one who is not included within the statute's list of "public officials."

Thus, this Court should grant certiorari to correct the obvious misinterpretation of section 201 by the Second Circuit and to resolve the split among the circuits on this important question which impacts directly on prosecutions generally aimed at public employees in positions of trust.

III.

PETITIONER BIAGGI'S TRAVEL ACT CONVICTION VIOLATES THE SPEECH OR DEBATE CLAUSE OF THE CONSTITUTION.

The Court of Appeals rejected petitioner Biaggi's contention that his Travel Act conviction should have been reversed because the government introduced proof in derogation of the immunity protection of the Speech or Debate Clause. Const., Art. 1, section 6, cl.1. This Court should grant certiorari to review this misapplication of an important constitutional principle.

The government called then-Congressman Biaggi's administrative aide as a witness and elicited from him on direct-examination that Congressman Biaggi's trips to Florida had been paid for by the House Subcommittee on the Aging (AA. 31). Over objection,[5] the government adduced additional evidence about

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[5] The Court of Appeals found that Biaggi had not, as the government argued, waived his Speech or Debate immunity (AA. 32).

Biaggi's legislative activities in Florida (AA. 31). Thereafter, in summation, the lead prosecutor portrayed these legitimate legislative fact-finding activities as Biaggi's "excuse" to travel to Florida (TR. 2030-2031).

While the Court of Appeals conceded that legislative activities are "protected" and that "it is generally true that the Speech or Debate Clause forbids not only inquiry into acts that are manifestly legislative but also into acts that are purportedly legislative (citation omitted)," it nonetheless held that "the trial record does not indicate that an impermissible inquiry was conducted" (AA. 30-31).

We submit that the prosecution in this case went far beyond the bounds of the Speech or Debate Clause and this Court's opinions interpreting its scope. *See Gravel v. United States*, 408 U.S. 606 (1972); *Eastland v. United States Serviceman's Fund*, 421 U.S. 491 (1975). The government here not only raised the issue that Biaggi's trips to Florida were related to Congressional business (a fact, by the way, which was not essential to prove the government's case), but then continued to explore the area, finally even impugning Biaggi's motives for conducting the fact-finding mission. This obvious and flagrant transgression of the Speech or Debate Clause immunity protection compels that certiorari be granted.

IV.

THE COURT OF APPEALS MISINTERPRETED THE TRAVEL ACT IN HOLDING THAT A GRATUITY OFFENSE MAY BE A PREDICATE THEREOF.

The Court of Appeals for the first time in this case unequivocally holds that a simple "gratuity" violation under 18 U.S.C. §201(c) [formerly §§201(f) and (g)] is a sufficient predicate to support a conviction for a violation of the Travel Act, 18 U.S.C. §1952. In so holding, the Court ignored the petitioners' contention that a gratuity offense cannot support a Travel Act violation because the legislative history of the Travel Act indicates that only specific intent crimes can serve as predicates. The Court focused instead primarily on the "policy, evolution, and

legislative history of §201" to conclude "that Congress intended a violation of any portion of that section [201]. . . . to constitute a 'bribery' offense within the meaning of §1952." (AA. 28). Because this conclusion stems from a clear misreading of the statute and its legislative history, this Court should grant certiorari.

This approach and the reasoning underlying it are fatally flawed. Congress enacted the Travel Act a year *before* the gratuity statute even existed and long before it was consolidated with other bribery offenses under section 201. How then could Congress have intended, as the Court of Appeals concluded, that all of the present section 201 offenses could serve as predicates for violation of the Travel Act? Clearly it could not have so intended, and there have been no subsequent changes in the Travel Act evincing a Congressional purpose to broaden its scope.

Finally, in the Travel Act's legislative history, there is a clear indication that Congress did intend that the predicates for Travel Act violations be only specific intent crimes. In supporting the bill, Senator McCulloch specifically stated:

> "I might add for the benefit of those who are concerned with the scope of the activity covered by the bill, that both a specific intent and the commission of an overt act is required before there is a violation. Thus, law enforcement officers will not be able to use the bill in an unrestricted fashion. S.R. 1654, 87th Cong., 1st Sess., 107 Cong. Rec. 16542 (1961)."

Since the section 201 gratuity offense does not require proof of specific intent, *United States v. Brewster*, 506 F.2d 62, 71-72 (D.C. Cir. 1974), it clearly cannot be one of those offenses which Congress intended as a Travel Act predicate, even had it existed at the time the Travel Act was enacted.

Thus, the Court of Appeals' plain misreading of the Travel Act and its legislative history requires that certiorari be granted.

V.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE DEFINITION OF A "PENDING GRAND JURY."

Although this Court has never expressly defined what evidence is necessary to prove that there is a pending grand jury proceeding, which is a prerequisite to a conviction for obstruction of justice under 18 U.S.C. §1503, several of the circuit courts have considered that question. *See e.g., United States v. Nelson*, 852 F.2d 706 (3d Cir. 1988), and *United States v. Vesich*, 724 F.2d 451 (5th Cir.), *reh'g. denied* 726 F.2d 168 (1984). No other circuit has held that proof which established only that an investigation was being conducted by a governmental agency was sufficient to meet that burden of proof until the Court of Appeals' decision in this case. Because this is an important question of statutory interpretation over which there is an apparent split among the circuits, this Court should grant certiorari.

The only proof offered by the government to establish that a grand jury proceeding was pending prior to the alleged act of obstruction was a stipulation that a grand jury had commenced an investigation some three and one-half months earlier (AA. 34). There was no testimony or documentary proof that the grand jury, having been empanelled, convened or took any action thereafter. This proof standing alone is not sufficient to prove a pending grand jury proceeding. *See, United States v. Vesich, supra.*

The Court of Appeals relied on testimony, elicited on cross-examination of the government's case agent, that there was a meeting of the prosecutor and the agents prior to June 2nd (the date of the obstructionist act) at which service of grand jury subpoenas was discussed and that some grand jury subpoenas were actually served on June 2nd (AA. 34). Since there was no proof that these actions were known to or sanctioned by the grand jury, they too are inadequate to satisfy the government's burden of proof. Indeed, since subpoenas are routinely prepared by the prosecutor without the grand jury's knowledge, this evidence only showed that the prosecutor and the FBI were continuing to investigate, much as they had prior to June 2nd. *United States v. Nelson*, 852 F.2d at 711 (in larger venues where

grand juries always sit legitimacy of subpoenas issued is not "inexorably assured"). In this regard, it is clear that the extensive wiretapping and bugging conducted by the FBI prior to June 2nd would not have established a pending grand jury even though evidence gathered by those means was crucial to the indictment in this case. *United States v. Fayer*, 573 F.2d 741, 745 (2d Cir.), *cert. denied* 439 U.S. 831, 99 S.Ct. 108 (1978). Similarly, a discussion among agents and prosecutor that grand jury subpoenas would be issued, search warrants sought, and interviews conducted does not, in any meaningful sense, prove anything other than a general investigative effort, unrelated to a specific grand jury investigation. *cf. United States v. Vesich*, at 451.

We submit that because the Court of Appeals concluded that this proof established that there was a pending grand jury, it is at odds with the other circuits which have considered the issue and therefore certiorari should be granted.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
November, 1988

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 892, 918—August Term, 1987

(Argued: March 30, 1988 Decided: August 1, 1988)

Docket Nos. 87-1484, -1501

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARIO BIAGGI and MEADE ESPOSITO,

Defendants-Appellants.

Before:

TIMBERS, KEARSE, and FRIEDMAN,*

Circuit Judges.

Appeals from judgments of the United States District Court for the Eastern District of New York, Jack B. Weinstein, then-*Chief Judge*, convicting defendant Biaggi of accepting unlawful gratuities, violating the Travel Act,

* Honorable Daniel M. Friedman of the United States Court of Appeals for the Federal Circuit, sitting by designation.

and obstructing justice, and convicting defendant Esposito of giving unlawful gratuities and of aiding and abetting violation of the Travel Act, *see* 673 F. Supp. 96 (1987); 674 F. Supp. 86 (1987).

Affirmed.

EDWARD A. MCDONALD, United States Department of Justice, Brooklyn, New York (Andrew J. Maloney, United States Attorney for the Eastern District of New York, Leonard Michaels, Special Attorney, Brooklyn, New York, on the brief), *for Appellee.*

JOHN L. POLLOK, New York, New York (Mark A. Summers, Charles L. Weintraub, Susan C. Wolfe, Mark Baker, Todtman, Hoffman, Epstein, Young, Goldstein, Tunick & Pollok, P.C., New York, New York, on the brief), *for Defendant-Appellant Mario Biaggi.*

EDWARD BRODSKY, New York, New York (Thomas H. Sear, Robert J.A. Zito, Maria L. Ciampi, Spengler Carlson Gubar Brodsky & Frischling, New York, New York, on the brief), *for Defendant-Appellant Meade Esposito.*

CHARLES TIEFER, Deputy General Counsel to the Clerk of the House of Representatives, Washington, D.C. (Steven R. Ross, General Counsel to the Clerk, Janina

Jaruzelski, Assistant Counsel to the Clerk, Washington, D.C., on the brief), *for the Speaker and Bipartisan Leadership Group of the United States House of Representatives as Amici Curiae.*

KEARSE, *Circuit Judge*:

Defendants Mario Biaggi and Meade Esposito appeal from judgments of conviction entered after a jury trial in the United States District Court for the Eastern District of New York before Jack B. Weinstein, then-*Chief Judge*. Biaggi was convicted on one count of accepting gratuities for official acts, in violation of 18 U.S.C. § 201(g) (1982) (current version at 18 U.S.C. § 201(c)(1)(B) (Supp. IV 1986)); one count of use of interstate facilities with intent to carry on an unlawful activity, in violation of 18 U.S.C. § 1952 (1982) (the "Travel Act") (since amended by Pub. L. No. 99-570, 100 Stat. 3207-35 (1986)); and one count of obstruction of justice, in violation of 18 U.S.C. § 1503 (1982). Esposito was convicted on one count of giving gratuities, in violation of 18 U.S.C. § 201(f) (1982) (current version at 18 U.S.C. § 201(c)(1)(A) (Supp. IV 1986)); and one count of aiding and abetting Biaggi's violation of the Travel Act, 18 U.S.C. §§ 1952 and 2 (1982). Biaggi was sentenced to concurrent prison terms of 2-1/2 years on the obstruction of justice count and a year and a day on the gratuity and Travel Act counts, and was required to pay fines totaling $500,000. Esposito was sentenced to two years' probation, with 500 hours of community service, and was ordered to pay fines totaling $500,000. On appeal, defendants contend that there was insufficient probable cause for the electronic surveillance of Esposito,

which led to much of the evidence against the defendants; that the government improperly excluded Italian-Americans from the jury; that Biaggi's acts were not "official act[s]" within the meaning of § 201; that the Travel Act convictions should be overturned on statutory and constitutional grounds; and that the evidence was insufficient to support Biaggi's conviction of obstruction of justice. They also challenge certain of the court's evidentiary rulings. For the reasons below, we reject all of defendants' contentions and affirm the judgments of conviction.

I. BACKGROUND

Biaggi is a 10-term congressman from New York's 19th Congressional District, which includes parts of Bronx and Westchester Counties. Esposito, former chairman of the executive committee of the Kings County, New York Democratic Committee, was, during the relevant period, a principal in an insurance brokerage firm, Serres, Visone and Rice, Inc. ("SVR"), and a director or affiliate of a printing company, Beaumont Offset Corporation ("Beaumont"). Biaggi and Esposito were indicted in a seven-count indictment focusing on Biaggi's efforts in 1984-1986 on behalf of Coastal Dry Dock and Repair Corporation ("Coastal"), a major client of SVR, and on Esposito's arrangement of payments of expenses for vacations in 1984-1986 for Biaggi and Biaggi's friend. The indictment charged, *inter alia*, that defendants conspired to arrange these vacations in furtherance of a fraud on the United States (count 1); that the vacations constituted bribes demanded by Biaggi and paid by Esposito (counts 2 and 3); that the vacations constituted unlawful gratuities paid by Esposito and received by Biaggi in return for official acts performed by Biaggi (counts 4 and 5); that Biaggi's

use of interstate facilities in furtherance of his receipt of the bribes or gratuities violated the Travel Act and that Esposito's funding arrangements aided and abetted that violation (count 6); and that after being questioned by agents of the Federal Bureau of Investigation ("FBI") with regard to two of his vacation trips, Biaggi sought to obstruct the grand jury investigation into these matters (count 7). Both defendants were acquitted on counts 1, 2, and 3. Biaggi was convicted on counts 5, 6, and 7; Esposito was convicted on counts 4 and 6. The evidence at trial, taken in the light most favorable to the government, revealed the following events.

A. *Biaggi's Actions on Behalf of Coastal; the Vacations*

Coastal, whose operations were located in the Brooklyn Navy Yard ("Yard") owned by New York City (the "City"), was in the business of repairing and refurbishing vessels of the United States Navy and other departments of the federal government. During the pertinent period, Coastal was SVR's second or third largest client, usually paying SVR more than $200,000 per year in insurance commissions. In general, the more work Coastal had, the larger its insurance premiums and thus the higher the commissions paid to SVR.

In the early 1980s, Coastal began to experience financial difficulties resulting largely from high fixed costs. It paid substantial rent to the Brooklyn Navy Yard Development Corporation ("BNYDC"), a not-for-profit corporation chartered by the City to run the Yard. Coastal also was required to purchase its electricity, steam, and water from BNYDC at rates higher than those it would have been charged had it purchased directly from the utility companies. In 1983, Coastal's utility rates rose, it lost three bids on Navy contracts, and important rent credits expired.

Beginning in March of that year, Esposito met with the chairman of BNYDC several times and with the City's deputy mayor to express concern about Coastal's situation; by September 1983, Coastal was a half-million dollars behind in its payments to BNYDC, and the BNYDC chairman threatened to complain to the Navy.

In March 1984, Esposito provided Biaggi with a round-trip airline ticket and a four-day vacation at a villa owned by Beaumont on the island of St. Maarten. Also present on the trip were Esposito and Esposito's partners in SVR and Beaumont. On May 9, 1984, Coastal's executive vice-president Vincent Montanti wrote Biaggi, urging him to assist Coastal in its dispute with BNYDC.

Shortly thereafter, Biaggi called Deputy Mayor Kenneth Lipper to express concern about Coastal's difficulties. In addition, in June 1984, Biaggi wrote Mayor Edward Koch a letter, on House of Representatives ("House") stationery, "on behalf of Coastal," urging the City "to work out some accomodations [*sic*]" with regard to Coastal's dispute with BNYDC. Actions by Biaggi's staff on behalf of Coastal were supervised by his congressional administrative assistant.

Biaggi wrote Mayor Koch again in September 1984, this time on the stationery of the House Committee on Merchant Marine and Fisheries. He noted that high utility costs were causing Coastal to lose Navy contracts and stated that he was "eager to be of any assistance in dealing with the Navy." He also suggested, as he had been asked to do by Coastal, that "my presence or the presence of a member of my staff during meetings between the City and Navy might be helpful in demonstrating Congressional interest."

Despite these efforts, Coastal's problems persisted. In October 1984, SVR had to lend Coastal $110,000 to pay overdue insurance premiums.

In mid-1984, Barbara Barlow, Biaggi's friend, had expressed a wish that she and Biaggi spend a Christmas holiday vacation at the Bonaventure Spa, a health resort near Fort Lauderdale, Florida. The couple planned to stay at the apartment of another friend of Biaggi, and Barlow informed Biaggi that they would need a sponsor to enable them to use the spa's facilities. Biaggi arranged through Esposito to have sponsorship provided by James LaRossa, an attorney who represented Esposito and Beaumont. Biaggi and Barlow participated in the spa's programs, she from December 22, 1984 through January 2, 1985, and he from December 27, 1984 through January 2. Their spa bill totaled $3,228, which was charged to the LaRossa account. LaRossa's law firm paid the bill and was reimbursed by Beaumont. Biaggi's air fare to Florida was paid by the House Committee on Aging.

In July 1985, Deputy Mayor Alair Townsend, Lipper's successor, warned Coastal that she would "shut off" its lights if it did not begin to pay its rent and utility arrears to BNYDC. A few days later, Biaggi called her to express concern about Coastal's situation. Biaggi called Townsend again in September 1985 to repeat his concerns and to urge the City to help Coastal.

While Coastal's difficulties with BNYDC continued through late 1985, a new problem arose. The FBI began investigating the company, causing the Navy to scrutinize claims for compensation more closely and to disallow many such claims. This led to a cash flow problem which in turn made Coastal even less competitive for new Navy contracts. In November 1985, these hardships forced

Coastal to cancel substantial amounts of insurance previously purchased through SVR.

On the day Coastal canceled those policies, Esposito, who sought to help Coastal by "working all angles," met with Biaggi and Coastal's Vincent Montanti. Within days, Biaggi sought to assist Coastal with the Navy. He called Alphonse D'Amato, United States Senator from New York, told him that Coastal was being treated unfairly, and asked him to meet with Coastal officials.

On December 2, 1985, Biaggi met with Esposito and Coastal's chairman Charles Montanti. The next day, he attended a meeting at Senator D'Amato's office with the Senator and Vincent Montanti, during which the Senator attempted to call Secretary of the Navy John Lehman. In the following weeks, Biaggi had many conversations with Senator D'Amato, in which he encouraged the Senator to help lobby Deputy Mayor Townsend and asked the Senator about any progress with Secretary Lehman.

Throughout 1985, Barbara Barlow had pressed Biaggi for a repeat of their previous year's winter vacation at the Bonaventure Spa. Biaggi asked Esposito to make the arrangements. On December 17, he telephoned Esposito, providing him with Barlow's name and indicating that she would be at the spa from December 22, 1985, through January 3, 1986, and that Biaggi would arrive on December 27. Immediately after the vacation details were dealt with, Esposito asked, "What else is doin'?" and Biaggi said, "By the way, we've been doin' wonders for Montanti." Biaggi reported that, "on the city side, we've been workin' very hard with them and on the . . . federal side, uh . . . we've been getting them money." He said, "I've been bird-dogging it right along." Esposito replied, "Okay. That's all I want to know."

Esposito immediately made arrangements with LaRossa for Biaggi and Barlow to stay at the spa and for the expense to be passed on to Beaumont. Esposito then telephoned Charles Montanti and assured him, "Mario's doin' his best." Later that day, Biaggi made additional calls to both Senator D'Amato and Deputy Mayor Townsend about Coastal.

On December 19, 1985, Esposito informed Biaggi that the spa arrangements were set, saying, "I got it all confirmed for you. . . . Relax." (As in 1984, Biaggi's air fare was to be paid by the House Committee on Aging.) On December 20, Esposito spoke with his SVR partner Joseph Martuscello and told him that Biaggi was going to be a guest at the spa, saying, "hey, that's good money invested." Martuscello said, "That's good"; Esposito replied, "Yeah, I did it last year too."

After Biaggi returned from this second Florida trip, he continued his efforts on behalf of Coastal. He told Esposito he planned to introduce a bill in Congress to spend $800 million on smaller craft, "stuff [Coastal] can handle." He also met with Senator D'Amato and Charles Montanti to prepare the Senator for a meeting with the Secretary of the Navy. He promised to, and did, call the Commandant of the Coast Guard in an attempt to get more work for Coastal. Biaggi continued his efforts until, in May 1986, Coastal went bankrupt.

B. *The Federal Investigation*

In October 1985, the federal government had begun an investigation of Esposito unrelated to the matters involving Coastal. In the course of this investigation, it obtained authorization to conduct electronic surveillance of Esposito's home and the offices of Beaumont and SVR. During

the surveillance, the agents overheard conversations concerning Biaggi's efforts on behalf of Coastal and the vacations provided him by Esposito and his business partners.

On June 2, 1986, FBI agents visited Biaggi and questioned him about his relationship with Esposito and his actions on behalf of Coastal. Minutes after the FBI interview concluded, Biaggi telephoned Esposito. As set forth in greater detail in Part II.E. below, Biaggi informed Esposito that he had just been questioned by the FBI and prompted Esposito to take the positions, *inter alia*, that Esposito had arranged the vacations because he was concerned for Biaggi's health, not because Biaggi was a member of Congress; and that Esposito's first approach to Biaggi with respect to Coastal had occurred only four or five months earlier. Biaggi also stated that, since he had told the FBI agents only about the two trips to Florida, Esposito should not mention the trip to St. Maarten.

C. *The Verdicts*

The jury acquitted Biaggi and Esposito of the charges that they had conspired to defraud the United States in violation of 18 U.S.C. § 371 (1982), and that they had, respectively, solicited and paid bribes in violation of 18 U.S.C. §§ 201(c) and (b) (1982) (current versions at 18 U.S.C. §§ 201(b)(2) and (b)(1) (Supp. IV 1986)). It convicted Biaggi of accepting gratuities in return for performing official acts, in violation of 18 U.S.C. § 201(g) (1982), of traveling in or using facilities in interstate commerce with the intent to carry out unlawful acts, in violation of 18 U.S.C. § 1952 (1982), and of obstructing justice, in violation of 18 U.S.C. § 1503. It convicted Esposito of paying gratuities to Biaggi in exchange for his official acts, in violation of 18 U.S.C. § 201(f) (1982), and of aiding and abetting Biaggi's Travel Act violation, in violation of 18

U.S.C. §§ 1952 and 2. Defendants were sentenced as indicated above.

II. DISCUSSION

On appeal, each defendant mounts a variety of challenges to his conviction. Esposito contends that there was insufficient probable cause to justify electronic surveillance of his home and offices and that the information thereby seized should have been suppressed. Biaggi contends that the evidence was insufficient to support his conviction for obstruction of justice. Both defendants, in addition to making certain evidentiary arguments, contend that the government improperly exercised its peremptory challenges to exclude jurors of Italian descent; that Biaggi's intercessions on behalf of Coastal were not "official act[s]" within the meaning of § 201; that the solicitation or receipt of unlawful gratuities is not a proper predicate for a charge of violation of the Travel Act; and that the court should have dismissed the Travel Act count as violative of the Speech or Debate Clause of Article I of the Constitution. We have considered all of defendants' arguments on these appeals and have found in them no basis for reversal.

A. *Probable Cause for Electronic Surveillance*

Much of the government's evidence in the present case was obtained through electronic surveillance of the home of Esposito and the offices of SVR and Beaumont pursuant to a series of court orders commencing in October 1985, pursuant to 18 U.S.C. § 2518 (1982 & Supp. II 1984) (amended by Pub. L. No. 99-508, 100 Stat. 1851-53, 1856, 1857 (1986)). Prior to trial, Esposito moved unsuccessfully to suppress the information derived from the surveillances

on the ground that there was insufficient probable cause for the issuance of the first such order. This contention, renewed here, lacks merit and does not require extended discussion.

To the extent pertinent here, § 2518 allowed a federal court to authorize interception of oral or wire communications if it determined, on the basis of the facts submitted by the applicant, that there was probable cause to believe (a) that an individual was committing, had committed, or was about to commit an offense enumerated in 18 U.S.C. § 2516 (1982 & Supp. II 1984) (amended by Pub. L. No. 99-508, 100 Stat. 1851, 1855 (1986) and Pub. L. No. 99-570, 100 Stat. 3207-35 (1986)), (b) that particular communications concerning that offense would be obtained through such interception, and (c) that the facilities to be surveilled were being used or were about to be used in connection with the commission of such an offense. 18 U.S.C. §§ 2518(3)(a), (b), and (d). The standard of probable cause applicable to § 2518 is "the same as the standard for a regular search warrant," *United States v. Fury*, 554 F.2d 522, 530 (2d Cir.), *cert. denied*, 433 U.S. 910 (1977), and a reviewing court will defer to the issuing court's determination that there was probable cause "as long as there existed a substantial basis for a magistrate or judge to conclude that a search would uncover evidence of wrongdoing," *United States v. Nersesian*, 824 F.2d 1294, 1306 (2d Cir.), *cert. denied*, 108 S. Ct. 357 (1987). There was no lack of probable cause in the present case.

The original surveillance order was entered on the basis of lengthy and detailed affidavits of an FBI agent setting forth, *inter alia*, information obtained through physical surveillances of certain individuals by law enforcement agents and information provided by a number of confi-

dential informants whose reliability had been proven over a span of 2-15 years. The details set forth in the affidavits, which remain under seal, furnished a substantial basis for believing that the individuals identified were using or were about to use the targeted premises for the commission of acts in violation of the racketeering statute, 18 U.S.C. § 1963 (1982), which is one of the offenses enumerated in § 2516. The facts that the anticipated offenses were unrelated to the subject matter of the present prosecution and that Biaggi was not mentioned in the application does not impair the conclusion that the information presented in the application provided probable cause for the issuance of the surveillance authorization. The motion to suppress was properly denied.

B. *The Peremptory Challenges*

Defendants contend that they are entitled to a new trial because the government purposely used its peremptory challenges to exclude Italian-Americans from the jury, in violation of defendants' rights under the Equal Protection Clause, *see Batson v. Kentucky*, 476 U.S. 79 (1986), and the Sixth Amendment, *see Roman v. Abrams*, 822 F.2d 214, 224-25 (2d Cir. 1987). We reject this contention.

During the voir dire, defendants pointed out to the court that the government had used its first five peremptory challenges to exclude members of the venire whose last names ended in vowels. They contended that this evinced the deliberate exclusion of Italian-Americans from the jury. Thereafter, the government also peremptorily challenged two alternate jurors whose last names ended in vowels. At the close of the voir dire, defendants moved to have the jurors dismissed and to select a jury from a new panel. In order to permit full briefing of the matter without delaying the trial—for which a jury had been selected

that did include Italian-Americans—the court postponed consideration of the matter until the trial had been concluded.

After trial, defendants renewed their motion and requested a new trial. The government submitted an affidavit setting forth the reasons of the lead prosecutor for the government's challenges. Both prosecutors who had participated in the voir dire testified at an evidentiary hearing and were subject to what the district court characterized as "vigorous and dogged" cross-examination by defense counsel.

In an opinion reported at 673 F. Supp. 96 (1987), the court denied defendants' motion. The court noted that defendants had made out a prima facie case of impermissibly discriminatory use of the government's peremptories. Thus, it observed that Americans of Italian descent share a common experience and culture, often share the same religious and culinary practices, often have commonly identifiable surnames, and have been subject to stereotyping, invidious ethnic humor, and discrimination, and it concluded that Italian-Americans are a cognizable racial group within the meaning of *Batson v. Kentucky*, 476 U.S. at 96, and *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). The court also found that the government had indeed used most of its peremptory challenges to strike jurors with apparently Italian surnames.

The court concluded, however, that the government had come forward with sufficient "neutral, specific and reasonable explanations substantiating legitimate exclusions of each of the veniremembers removed," 673 F. Supp. at 106, and thus had rebutted defendants' prima facie case. The court found, for example, that the government had excused several of the prospective jurors because they or

their spouses had held positions that might have led them to identify with one of the defendants; it also found that several of those excused by the government had displayed angry, arrogant, or flippant demeanors that led the government to be concerned that they might be insufficiently serious about jury duty and perhaps even disdainful of the judicial process. The court therefore found that the government's reasons for striking the challenged jurors were legitimate rather than invidious. It found the suggestion of purposeful discrimination further rebutted by the actual composition of the jury, which included at least two members of Italian descent and comprised "an excellent cross-section of the Eastern District of New York by ethnic background, race, sex, education, age, experience and geography." *Id.*

The district court's findings as to the motivations of the prosecution in exercising its peremptory challenges must be upheld unless they are clearly erroneous, *Roman v. Abrams*, 822 F.2d at 228; *see Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985), and its assessments of the credibility of the witnesses who appear before it are entitled to considerable deference. Where the court itself has conducted the voir dire and thus was able to observe as well the demeanor of the prospective jurors, we believe the court's assessment of the prosecution's stated reasons for excusing jurors is entitled to especial deference.

In the present case, the explanations offered by the government were neither trivial nor unsupported by the record. We conclude that the district court's findings as to the explanations offered by the government are not clearly erroneous, and that its conclusion that there was no viola-

tion of defendants' rights under the Equal Protection Clause or the Sixth Amendment must be upheld.

C. *The Gratuity Charges*

Section 201 of 18 U.S.C., entitled "Bribery of public officials and witnesses," contained various provisions outlawing the giving or receipt of anything of value in exchange for, *inter alia*, a federal official's performance of official acts. The section defined "official act" to mean

> any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

18 U.S.C. § 201(a) (1982) (since amended by Pub. L. No. 99-646, § 46(a), 100 Stat. 3592, 3601 (1986)). The subsections dealing with unlawful gratuities provided as follows:

> (f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . . ; or
>
> (g) Whoever, being a public official . . . otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . .
>
> . . . .

> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. §§ 201(f) and (g) (1982).

Defendants contend that the acts performed by Biaggi on behalf of Coastal were not "official act[s]" within the meaning of § 201 because they were not legislative acts and because they were directed principally toward municipal, not federal, agencies. In addition, defendants contend that there was insufficient evidence to show that the vacations were offered or accepted "for or because of" Biaggi's acts. We reject both contentions.

1. *Official Acts*

Biaggi's suggestion that a congressman's only "official act[s]" within the meaning of § 201 are acts in the legislative process itself is untenable. The language of the section does not mention legislative acts, and courts have read the section and its predecessors sufficiently broadly to encompass all of the acts normally thought to constitute a congressman's legitimate use of his office.

The earliest pertinent interpretation is found in *United States v. Birdsall*, 233 U.S. 223, 231 (1914), in which the Supreme Court upheld convictions in connection with bribes given to employees of the Department of the Interior to induce them to recommend lenient sentencing for certain persons convicted of selling liquor to Indians. The statutes at issue made it unlawful to give a bribe to a federal officer with the intent to influence him "to do or omit to do any act in violation of his lawful duty," and unlawful for the officer to accept money with the intent to have "his decision or action" influenced "on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in

his official capacity." Criminal Code §§ 39, 117, 35 Stat. 1096, 1109 (1909). In determining whether recommendations by the federal employees were part of their official duties, the Court noted that conduct could constitute official action even though it was not prescribed by statute or written rule or regulation. The scope of official conduct may be found, in addition, in "established usage," for "[i]n numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery." 233 U.S. at 231.

In the context of a prosecution of a former United States Senator for alleged bribery, the Supreme Court has noted that "the realities of the American political system" are that "many non-legislative activities are an established and accepted part of the role of a Member" of Congress. *United States v. Brewster*, 408 U.S. 501, 524 (1972). Thus, this Court has recognized that a congressional aide's use of his congressman's official position to help private individuals constitutes an official act by the aide within the meaning of § 201(a). *United States v. Carson*, 464 F.2d 424 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972). In *Carson*, we upheld the bribery conviction of a United States Senator's administrative assistant, noting that the defendant, "as a part of his job and under the applicable 'procedure that goes on at Capitol Hill,' . . . would exert influence on various agencies and branches of the Government . . . ." *Id.* at 434. We noted that even if the aide's intervention in a certain criminal prosecution were a " 'personal frolic of his own,' " it would nonetheless constitute an official act, "the determinative factor [being] that the primary source of any conceivable influence . . . was the official position held by [the aide], enhanced as it was by

the status of his employer's membership'' in the Senate Judiciary Committee. *Id.* A congressman's own invocation of his position and of congressional interest in his intercession with others on behalf of a constituent can hardly be considered less of an official act.

Consistent with the judicial recognition of the realities of the scope of a congressman's job, defendants' attorneys, in cross-examining Senator D'Amato at trial, brought out the fact that the duties of senators and representatives routinely include interceding with various agencies on behalf of their constituents. For example:

> Q [by Esposito's attorney] . . .
>
> Senator D'Amato, as part of your responsibilities and endeavors as a senator, do you and your staff get involved with the problems of people in New York, business people, who are looking for your help?
>
> A Certainly.
>
> Q And would you say that that's done on a daily basis, isn't that correct?
>
> A Absolutely.

As an illustration, Esposito's counsel elicited the fact that in 1982, both of New York's senators and at least four of its representatives, including Biaggi, had collaborated on an effort to have Coastal awarded a contract to repair the Navy ship IOWA.

Biaggi's counsel's questioning of the Senator proceeded along the same lines:

> Q [by Biaggi's counsel] Your office is open to anyone that would either call or write with a problem, with a question, with a need or desire, is that correct?

A That is correct.

Q That's part of being a United States Senator or a Congressman?

A I think so.

With respect to the December 3, 1985 meeting among Biaggi, Senator D'Amato, and Vincent Montanti, during which the Senator attempted to call the Secretary of the Navy, Biaggi's attorney asked,

Q So that's what you and Congressman Biaggi were doing on December 3, 1985? You were stepping up to the plate and you were at bat doing your jobs, is that correct?

A Yes, that's correct.

Certainly the manner in which Biaggi went about seeking to help Coastal suggested that his conduct was to be considered official. For example, he wrote letters on behalf of Coastal using his congressional stationery, or using the stationery of the House Committee on Merchant Marine and Fisheries and signing as Chairman of the Subcommittee on Merchant Marine. He opened an office file on Coastal and had the matter handled by his administrative assistant, the top manager of his congressional office. He told Esposito he planned to introduce a bill in Congress that could provide work for Coastal. In one of his letters to Mayor Koch, Biaggi offered to attend meetings between the City and the Navy with respect to Coastal if the Mayor thought that might be "helpful in demonstrating Congressional interest." We know of nothing in the law that precluded the jury from considering Biaggi's intercessions as official acts, and the evidence plainly supported the inference that they were official acts.

We also reject Biaggi's contention that the gratuity provisions did not apply to his acts because they were directed at City officials rather than federal officials. No such limitation appears on the face of § 201, which refers to "any" action taken on a matter brought before the public official in his official capacity. The breadth of § 201 is highlighted by the narrower thrust of 18 U.S.C. § 203 (1982) (since amended by Pub. L. No. 99-646, § 47(a), 100 Stat. 3592, 3604 (1986)), a conflict-of-interest statute enacted contemporaneously with the pertinent version of § 201. Section 203 prohibits an official from accepting payment in relation to matters pending before specific federal forums. *See* 18 U.S.C. § 203(a); *United States v. Myers*, 692 F.2d 823, 855 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983). We assume that Congress's failure similarly to limit § 201's definition of "official act" reflects an intention that § 201 not be restricted to acts directed at federal agencies.

Nor does the legislative history of § 201 provide a basis for reading the section more narrowly than it was drafted. The section's immediate predecessor with respect to the legislative branch, while referring specifically to matters pending in Congress, also made it unlawful for a member of Congress to receive payment "with the intent to have his action . . . influenced on any question, matter [or] cause . . . which by law may be brought before him in his capacity as such Member." 18 U.S.C. § 205 (1958). The legislative history of § 201 noted that the new § 201, which used substantially the same language, made "no significant changes of substance." S. Rep. No. 2213, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. Code Cong. & Admin. News ("USCCAN") 3852, 3853; 1962 USCCAN at 3856 ("The term 'official act' is defined to include any decision or action taken by a public official in his capacity as such.").

In sum, we see no basis for ruling that a congressman's official acts—especially those "demonstrating Congressional interest"—may not include efforts that are directed toward local rather than federal officials. We note that both of the deputy mayors approached by Biaggi testified at trial that it was not unusual for a congressman to intercede for a constituent on city matters; Biaggi easily gained their attention precisely because he was a congressman.

Finally, the evidence revealed that Biaggi's efforts were directed toward federal officials as well as City officials. He urged Senator D'Amato to call the Secretary of the Navy, and he repeatedly called the Senator to inquire as to what progress had been made. He himself called the Commandant of the Coast Guard.

The trial court read the jury the statutory definition of "official act[s]" and properly instructed it that "[o]fficial acts are not limited to those set forth in a written job description, but may include as well those duties and activities customarily associated with a particular position." The evidence was ample to permit the jury to conclude beyond a reasonable doubt that the acts performed by Biaggi on behalf of Coastal were among those customarily associated with a congressman's job.

2. *The Sufficiency of the Evidence that the Vacations Were in Return for the Official Acts*

In arguing that the evidence was insufficient to show that Esposito provided Biaggi with vacations "for or because of" Biaggi's official acts on behalf of Coastal, defendants bear a heavy burden. *United States v. Losada*, 674 F.2d 167, 173 (2d Cir.), *cert. denied*, 457 U.S. 1125 (1982). In reviewing this contention, we must view the evidence in the light most favorable to the government,

Glasser v. United States, 315 U.S. 60, 80 (1942), crediting every inference that could have been drawn in the government's favor, *United States v. Bagaric*, 706 F.2d 42, 64 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983), and we must affirm the convictions so long as, from the inferences reasonably drawn, the jury might fairly have found the requisite connection beyond a reasonable doubt, *United States v. Taylor*, 464 F.2d 240, 245 (2d Cir. 1972). Defendants have not carried their burden.

The evidence at trial, taken in the light most favorable to the government, including the nature and sequences of events, certain explicit statements, and the suggestions of cover-up, provided an ample basis for the jury rationally to infer that the vacations were given and accepted in exchange for Biaggi's efforts on behalf of Coastal. The jury could reasonably have inferred, for example, from the very substantial cost of the Florida vacations—several thousands of dollars in each year—that the vacations were not intended simply as kindness-of-the-heart gifts from Esposito or his companies. Further, Esposito's arrangements for the Florida vacations were solicited by Biaggi; the jury was free to infer that Biaggi was not requesting gifts of thousands of dollars without offering something more than his friendship in return.

The sequences themselves lent further support to the jury's rejection of any inference that Biaggi offered nothing and Esposito expected nothing in return for the vacations. For example, after BNYDC drew a hard line with Coastal in late 1983, Biaggi was given a vacation in St. Maarten in early 1984, in the company of, *inter alios*, SVR partners whose commissions were jeopardized by Coastal's problems with BNYDC. Some weeks thereafter, Biaggi called Deputy Mayor Lipper, and later followed up

with a letter to Mayor Koch, to seek relief for Coastal. In mid-1984, Barlow began urging Biaggi to take her to the Fort Lauderdale spa for the Christmas holidays. During the latter half of 1984, Biaggi, *inter alia*, wrote another letter to Mayor Koch and offered to meet with Coastal and the Navy to show congressional concern. By Christmas 1984, Esposito had made the necessary arrangements for Biaggi and Barlow to use the spa. Throughout 1985, Barlow pressed Biaggi for a return to the spa the following Christmas season. From mid-1985 to the end of the year, Biaggi "bird-dogg[ed]" Coastal's problems, repeatedly calling Deputy Mayor Townsend with regard to BNYDC charges, securing payment by the Navy of some of Coastal's closely scrutinized claims, and calling on Senator D'Amato to seek help from the Secretary of the Navy. In the fall of 1985, Biaggi called Esposito and told him that Biaggi and Barlow wanted to return to the spa. Esposito said he would make the arrangements and immediately asked what progress Biaggi was making for Coastal; the tape of this conversation, quoted in part in Part I.A. above, suggests that both Biaggi and Esposito viewed the two matters as related. The jury was surely free to infer that defendants' implicit understanding was that the thousands of dollars committed by Esposito for Biaggi's vacations were a quid pro quo for Biaggi's Coastal efforts. Indeed, when Esposito told his SVR partner Martuscello that he had provided the two Florida vacations for Biaggi, Esposito himself characterized it as "good money invested."

Finally, support for the inference that the vacations were provided in exchange for Biaggi's efforts on behalf of Coastal is found in Biaggi's telephone call to Esposito, suggesting various fabrications, immediately after Biaggi had been questioned by the FBI. As set forth in greater

detail in Part II.E. below, he coached Esposito, *inter alia*, to characterize the vacations as manifestations of simple concern for Biaggi's health; to lie about the timing of Esposito's request that Biaggi intercede for Coastal, placing that request after the last vacation; and to conceal the St. Maarten vacation entirely. In short, Biaggi told Esposito, "We say you haven't done anything for me and I haven't done anything for you."

We conclude that the evidence was ample to permit a rational jury to find beyond a reasonable doubt that Esposito provided the vacations "for or because of" Biaggi's official acts on behalf of Coastal.

D. *The Travel Act*

Count 6 of the indictment charged Biaggi with violation of the Travel Act, 18 U.S.C. § 1952, and charged Esposito with aiding and abetting that violation, on the ground that Biaggi traveled in interstate commerce, or used facilities in interstate commerce, to carry on an unlawful activity, to wit, "bribery in violation of [§] 201." Defendants contend that their convictions on count 6 should be vacated because (1) they were acquitted of giving or receiving unlawful bribes in violation of 18 U.S.C. §§ 201(b) and (c), and convictions of giving and receiving unlawful gratuities are insufficient to support a Travel Act conviction, and (2) since Biaggi's air fare to Florida was paid by the House Committee on Aging in connection with potential legislation, Biaggi's travel was protected by the Speech or Debate Clause of the Constitution. We are unpersuaded.

1. *Unlawful Gratuities as a Travel Act Predicate*

Section 1952 of 18 U.S.C. makes it unlawful to "travel[ ] in interstate or foreign commerce or use[ ] any

facility in interstate or foreign commerce . . . with intent to . . . promote, manage, establish, carry on, or facilitate . . . carrying on, of any unlawful activity." 18 U.S.C. § 1952(a)(3). As used in § 1952, "unlawful activity" is defined, in pertinent part, to mean "bribery . . . in violation of the laws of the State in which committed or of the United States." *Id.* § 1952(b). In determining how to instruct the jury as to permissible predicates for a Travel Act conviction, the trial court noted, *inter alia*, that count 6 of the indictment referred simply to § "201" as the Travel Act predicate, without distinguishing between the subsections that referred to "corrupt[ ]" intent to influence official action (§§ 201(b) and (c)) and the subsections that prohibited gratuities without requiring proof of "corrupt[ion]" and "intent to influence" (§§ 201(f) and (g)). It also noted that § 201 as a whole is entitled "Bribery of public officials and witnesses." Accordingly, the court instructed the jury, over defendants' objections, that it could base Travel Act convictions on violations of the gratuity provisions, §§ 201(f) and (g), even if it found defendants not guilty of violating §§ 201(b) and (c). Defendants contend that this instruction was erroneous and that, since the jury acquitted them of the charges under subsections (b) and (c), the court should have granted their posttrial motion to set aside the Travel Act convictions. We disagree.

In a well-reasoned posttrial opinion reported at 674 F. Supp. 86 (1987), the district court thoroughly explored the question whether Congress intended a violation of the gratuity provisions of § 201 to suffice as a predicate for a Travel Act conviction, and we reject defendants' statutory construction challenge to the count 6 conviction substantially for the reasons set forth in that opinion.

As the district court noted, the crime of bribery eludes precise definition. While the term "bribe" traditionally carried a connotation of corrupt intent to influence official action, the trend among scholars, commentators, and legislators has been away from linking impermissible bribery ineluctably to corruption, *see Perrin v. United States*, 444 U.S. 37 (1979), particularly where the thing of value is given to a public official. We think it undoubtedly true that a corrupt payment intended to influence an official act is more serious than a payment merely "for or because of" an official act without proof of corruption, and the penalties provided by Congress reflect such an assessment. *See, e.g.*, 18 U.S.C. § 201 (1982) (possible penalties for violation of subsections (b) and (c), requiring proof of corrupt intent, included $20,000 fine and 15 years' imprisonment, whereas penalties for violations of subsections (f) and (g) were fines of "not more than $10,000 or imprisonment for not more than two years, or both"). Nonetheless, "[t]here is no reason to infer that the policy and purpose behind the 'corrupt intent to influence' offenses [are] substantially different from [those] underlying the 'for or because of' offenses. All sections of the bribery statute are aimed at preventing the evil of allowing citizens with money to buy better public service than those without money. . . . '[e]ven if corruption is not intended by either the donor or the donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the donor by the donee, or the inefficient management of public affairs.' " 674 F. Supp. at 89 (quoting *United States v. Evans*, 572 F.2d 455, 480 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978)).

This substantial identity of the purposes behind the two levels of offense was evident prior to the enactment of § 201, for certain of the bribery statutes that were prede-

cessors of § 201 conjoined the prohibitions against offering a thing of value "because of" an official act and against offering it "with intent to influence" that act. Thus, in the 1958 Criminal Code, § 206 made it unlawful to offer a thing of value "because of or with intent to influence" a judge's decision, 18 U.S.C. § 206 (1958); and § 207 made it unlawful for the judge to receive a thing of value "because of or with intent to be influenced," 18 U.S.C. § 207 (1958). Accordingly, a defendant prosecuted under one of those sections could have been convicted of bribery without proof of "corrupt" intent. Although § 201, enacted in 1962, grouped the "corrupt intent" offenses separately from the "because of" offenses and provided different penalties for the two groups, the legislative history indicates that Congress's purpose was simply to "consolidate . . . the various existing bribery statutes" governing various officials "into a single section." 108 Cong. Rec. 21,981 (1962) (statement of Senator Kefauver). As discussed in Part II.C.1. above, the legislative history of § 201 stated that Congress intended "no significant changes of substance." S. Rep. No. 2213, 87th Cong., 2d Sess., *reprinted in* 1962 USCCAN at 3853; *see also* 108 Cong. Rec. 21,981 (1962) ("consolidation makes no significant changes of substance and would not narrow the broad sweep of the current bribery laws") (statement of Senator Kefauver).

In sum, we agree with the district court that the policy, evolution, and legislative history of § 201 indicate that Congress intended a violation of any portion of that section, which it entitled "Bribery [of various persons]" and viewed as a compilation of bribery offenses, to constitute a "bribery" offense within the meaning of § 1952.

2. *The Speech or Debate Clause*

Biaggi also mounts a constitutional challenge to his Travel Act conviction, arguing principally that because he conducted legislative activity in Florida during the 1984 and 1985 Christmas holiday trips and his travel was necessary to carry out that activity, the Speech or Debate Clause immunized him from prosecution under 18 U.S.C. § 1952. We disagree. Travel itself normally lacks the necessary legislative character to trigger speech-or-debate protection. Further, proof of Biaggi's use of interstate telephone facilities sufficed to support the convictions under § 1952 regardless of any travel.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators or Representatives] shall not be questioned in any other Place." U.S. Const. art. 1, § 6, cl.1. As the Supreme Court has noted, "[t]he heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings . . . ." *Gravel v. United States*, 408 U.S. 606, 625 (1972). Thus, the clause does not protect "all conduct *relating* to the legislative process." *United States v. Brewster*, 408 U.S. at 515 (emphasis in original). In *Brewster*, the Court ruled that the clause did not bar the prosecution of a Senator for accepting bribes in exchange for promises to vote in a certain way, because the acceptance of money is not a legislative act. In *Gravel*, the Court found the clause applicable to the actions of a Senator's administrative assistant to prepare the Senator for a subcommittee meeting in Washington, but inapplicable to the Senator's subsequent contacts with a publisher to publish papers that the Senator

had read at the meeting. Although publication might have some relationship to the legislative process, it was not integral to the process.

Gravel and other cases make it clear that speech-or-debate protection extends beyond congressmen's statements on the floor of the Congress. In *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), the Court held that the issuance of a subpoena by a Senate subcommittee pursuant to an authorized investigation fell within *Gravel*'s definition of protected legislative activity. The *Eastland* Court noted that "the power to investigate is inherent in the power to make laws because '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" *Id.* at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)). *See also McSurely v. McClellan*, 553 F.2d 1277, 1286 (D.C. Cir. 1976) (en banc) ("information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation" and hence is protected legislative activity), *cert. dismissed*, 438 U.S. 189 (1978).

Under these principles, legislative factfinding activity conducted by Biaggi during his Florida trips was protected. We reject, however, Biaggi's contention that his speech-or-debate immunity was invaded by the very fact that his legislative activities in Florida were brought to the jury's attention. While it is generally true that the Speech or Debate Clause forbids not only inquiry into acts that are manifestly legislative but also inquiry into acts that are purportedly legislative, "even to determine if they are legislative in fact," *United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir.), *cert. denied*, 414 U.S. 823 (1973), the trial

record does not indicate that an impermissible inquiry was conducted. The government called Robert Blancato, Biaggi's administrative assistant, as a witness, and asked him whether the House Committee on Aging had paid Biaggi's air fare for the two trips to Florida. As the questioning with regard to these two payments progressed, Biaggi's counsel objected, saying, "We have the speech and [debate] issue," an objection that was fairly overruled in light of the charge that Biaggi had conspired to defraud the United States, *see, e.g., United States v. Bramblett*, 348 U.S. 503 (1955) (reinstating conviction of congressman for presentation of false payroll claim, *cited in United States v. Brewster*, 408 U.S. at 522 n.16, a speech-or-debate case); *United States v. Myers*, 692 F.2d at 849 (dictum) (prosecution for false travel voucher not protected by Speech or Debate Clause, citing *United States ex rel. Hollander v. Clay*, 420 F. Supp. 853 (D.D.C. 1976)). Immediately thereafter, Blancato, without a further question from the government, volunteered that the Florida trips were "[i]n 1984 as part of a fact finding visit to inspect and visit the agency on Aging in Broward County and 1985 to visit the Health Maintenance Organization in preparation for the congressional hearings to be held in New York City . . . ." Eventually, Biaggi's attorney unsuccessfully requested a ruling from the court that the government's payment of Biaggi's air fare was not relevant. That request was accompanied by the statement that "the government has put into evidence and I did not object, there are times I don't object for strategic reasons, the fact that Congressman Biaggi's flight fare was paid for [sic] the Committee for the Aging." The "strategic reasons" for the lack of any further objection were obvious: the fact that there may have been a legislative factfinding purpose for Biaggi's trips to Florida provided defendants

with a foundation for arguing to the jury that those trips were not in furtherance of the receipt of unlawful gratuities.

Thus, the record reveals that the government initially sought to focus on nonlegislative reasons for Biaggi's trips and did not initiate the exploration of his legislative factfinding activity, that the factfinding activity was first mentioned by Biaggi's aide in a volunteered statement when no question from the government was pending, and that after that statement there was no further speech-or-debate objection by Biaggi "for strategic reasons." We conclude that the subsequent questioning of Blancato with regard to that activity and the government's efforts to minimize the role of that activity as an impetus for the Florida trips provide no basis for reversal. We do not, of course, construe Biaggi's strategy with regard to use of the factfinding activity as in any way waiving his argument that the travel itself was part of the protected activity. *See United States v. Helstoski*, 442 U.S. 477, 491 (1979) (no waiver of speech-or-debate immunity without "explicit and unequivocal renunciation of the protection").

We are unpersuaded, however, that the travel itself should be considered legislative activity. Travel may well be related to the legislative process if its purpose is, for example, to attend a debate or to conduct on-site collection of information for consideration of contemplated legislation. Nonetheless, unless the focus of the legislation itself is transportation, the mere transport of oneself from one place to another is simply not "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings." *Gravel v. United States*, 408 U.S. at 625. We conclude that the Speech or Debate Clause does not immunize a con-

gressman from prosecution for interstate travel in furtherance of receipt of an unlawful gratuity, any more than it would immunize him from a charge of theft of services if he traveled as a stowaway.

The fact that one of the purposes of the travel may have been the conduct of legislative activity does not preclude a conviction under § 1952. We have held that "[w]here travel is motivated by two or more purposes, some of which lie outside the ambit of the Travel Act, a conviction is still possible if the requisite illegal purpose is also present." *United States v. Walsh*, 700 F.2d 846, 854 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983); *see United States v. Peskin*, 527 F.2d 71, 75 (7th Cir. 1975) ("section 1952 does not require that defendant's travel be solely in pursuit of criminal activity"), *cert. denied*, 429 U.S. 818 (1976).

Finally, even if there had been no travel whatever by Biaggi, the government's allegations and proof were sufficient to support the convictions under § 1952. That section prohibits not just "travel[ ]" to carry out unlawful activity; it also prohibits use of any interstate facility for such purposes. Count 6 of the indictment alleged that Biaggi used such facilities to carry on his activities in violation of § 201, and the proof included evidence that Biaggi called New York from Washington to ask Esposito to arrange for his stay at the spa. The jury was properly instructed that it could find defendants guilty under § 1952 if it found that either the travel or the use of the telephones was in furtherance of acts in violation of § 201. The evidence was sufficient to support either.

E. *Obstruction of Justice*

Section 1503 of 18 U.S.C. makes it unlawful to "corruptly . . . influence[ ], obstruct[ ], or impede[ ], or

endeavor[ ] to influence, obstruct, or impede, the due administration of justice." To obtain a conviction under this section, the government is required to prove that there was a pending federal judicial proceeding, that the defendant knew of the proceeding, and that he intentionally interfered with or attempted to interfere with it. *See United States v. Capo*, 791 F.2d 1054, 1070 (2d Cir. 1986), *vacated in part on other grounds*, 817 F.2d 947 (2d Cir. 1987) (en banc). Biaggi's conviction under this section is based on the government's contention that Biaggi impeded and attempted to impede the grand jury's investigation by urging Esposito on June 2, 1986, to withhold information and to give false, evasive, and misleading information. Biaggi contends that the evidence was insufficient to show that when he had the pertinent conversation with Esposito, (a) a grand jury proceeding was pending, and (b) he knew such a proceeding was pending. We disagree.

The parties stipulated at trial that on February 13, 1986, a federal grand jury in the Eastern District "commenced an investigation into the matter set forth in the indictment for which the defendants are currently on trial." There was testimony at trial that in connection with this investigation, FBI agents met on or about June 1, 1986, to discuss conducting 50-60 interviews and serving some 70 grand jury subpoenas. On the morning of June 2, FBI agents interviewed Biaggi and shortly thereafter served him with a subpoena. While Biaggi was being interviewed, other agents were interviewing Barlow; the testimony indicated that Barlow was served with a grand jury subpoena during her interview. Thus, the record amply permitted the inference that when Biaggi called Esposito after Biaggi's interview, a grand jury proceeding was pending.

Though there was no testimony as to whether the interviewing agents had informed Biaggi of the grand jury, the

record suggests that he knew of it. Prior to Biaggi's call to Esposito, Barlow, who was served with a grand jury subpoena during her interview, spoke by telephone with Biaggi. When Biaggi thereafter called Esposito (and prompted Esposito, *inter alia*, to agree that he and Biaggi had been "very dear friends" for quite a long time, and that Esposito was concerned about Biaggi's health and had invited him to the spa for that reason), he urged Esposito to pay attention because "[t]his is serious." Esposito said, "It sounds like a fuckin' grand jury." Biaggi replied, "That's, that's what I'm talking about." Crediting all inferences that could be drawn in the government's favor, we conclude that the evidence was sufficient to permit the jury to infer that, when he spoke with Esposito, Biaggi knew the grand jury proceeding was pending.

There can be no doubt that Biaggi sought to have Esposito impede the investigation. For example, having coached Esposito to characterize the Florida spa trips as emanating simply from an old and dear friend's concern for Biaggi's health (Biaggi: "You knew I had, you knew I had some trouble with my heart?" Esposito: "When?"), Biaggi urged concealment of the St. Maarten trip:

> MB [Biaggi]: . . . Uh, don't mention St. Maartens [*sic*] . . . cause I . . .
>
> ME [Esposito]: Oh, I thought that you mentioned it.
>
> MB: No, they just, I didn't mention it.
>
> ME: Okay.
>
> MB: Uh, we just mention the two times at the spa.
>
> ME: No problem.

Returning to the matter of the spa vacations, defendants agreed:

ME: This is not a gift. It's uh, it's a, uh, manifestation of my love for you.

MB: You didn't give it to me because I'm a member, member of Congress.

ME: Nah. Never, no bull. No way.

MB: Have you ever done, have you ever done anything for me?

ME: Have I ever done anything for you?

MB: I, I told them, "No." We say you haven't done anything for me and I haven't done anything for you. . . .

ME: That's right.

MB: And that's the way we're gonna keep it.

We see no basis for overturning Biaggi's conviction for obstruction of justice.

F. *Evidentiary Contentions*

Finally, defendants make two principal claims of error with respect to the court's evidentiary rulings, (1) that the court should have excluded evidence of the St. Maarten trip, and (2) that it should have excluded an ambiguous tape of a conversation between Esposito and a bookkeeper at Beaumont. We reject both contentions.

In arguing that the evidence of Esposito's providing Biaggi with the March 1984 trip to St. Maarten should have been excluded, defendants contend that the court admitted this evidence as "other acts" under Fed. R. Evid. 404(b) without a proper foundation for such a ruling. We disagree with both the characterization of the

basis of admission and the contention that admission was error.

The basis for defendants' assertion that the court acted under Rule 404(b) apparently has its origin in a confusion displayed by defendants in the trial court. They urged exclusion of the St. Maarten evidence on the theory that the trip predated the period of the conspiracy and thus could not have been in furtherance of it, and they argued that it was incumbent on the court to make a preliminary determination as to the time period covered by the conspiracy. The court noted that such a preliminary determination would be necessary with regard to the admissibility of alleged coconspirator statements challenged on hearsay grounds, *see United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); Fed R. Evid. 801(d)(2)(E), but pointed out that the evidence relating to the St. Maarten trip was not subject to a hearsay objection because it did not consist of statements. Thus, the court's response to defendants' position was, "Acts, acts. That's not hearsay. The man went to St. Maarten. His payments were made. Those are acts. That's not hearsay at all." Defendants have transmuted this explanation of why hearsay principles were not at issue into an assumed ruling that the St. Maarten trip was an "other act" governed by Rule 404(b). There is no basis for this assumption.

In fact, the St. Maarten trip was cited in the indictment as an overt act in furtherance of the conspiracy, and the government was entitled to prove that trip as part of the conduct—conspiracy—for which defendants were indicted. Thus, far from being an "other" act, it is part of the very act charged. *See, e.g., United States v. Angelilli*, 660 F.2d 23, 39 (2d Cir. 1981), *cert. denied*, 455 U.S. 910

(1982); *United States v. Papadakis*, 510 F.2d 287, 294-95 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). Defendants' contention that the provision of this trip had nothing to do with the alleged conspiracy on behalf of Coastal was an argument to be made to the jury rather than a ground for exclusion of the evidence by the court. Further, evidence as to the St. Maarten trip was admissible because the government charged that Biaggi's urging Esposito to conceal that trip was part of Biaggi's effort to obstruct justice.

Defendants made no request that the court instruct the jury that the St. Maarten trip could be considered only with respect to the conspiracy and obstruction of justice counts and not as evidence supporting the substantive counts charging bribery and unlawful gratuities, and we need not reach the question of whether the court should have done so if requested. No limitation having been requested or given, the jury was entitled to consider the evidence in connection with all of the counts in the indictment.

Defendants' other principal evidentiary challenge is to the admission of a taped conversation between Esposito and a Beaumont officer on June 2, 1986, after Biaggi had been interviewed by the FBI, offered by the government to show that Esposito asked, "How much we got in" Biaggi, and received the answer "10-2." These statements were admitted against Esposito as admissions, *see* Fed. R. Evid. 801(d)(2)(A) and (B), and against Biaggi as statements of Esposito against Esposito's penal interest, *see* Fed. R. Evid. 804(b)(3). Defendants contend that the conversation was not as the government transcribed it and that, accurately interpreted, the conversation was neither against Esposito's interest nor relevant to the issues of the present

case. Given the course of the proceedings below, we find no basis for reversal.

In making their initial objections to the introduction of the conversation, defendants advanced a different objection, one that did not dispute what was said so much as it disputed the doctrinal characterization of what the government said was said. Thus, they contended that the alleged bribery-gratuity conspiracy between Biaggi and Esposito had ended with the FBI interviews on June 2, and that subsequent conversations could not be considered to be in furtherance of the conspiracy and thus admissible under Fed. R. Evid. 801(d)(2)(E). When the court ruled that the conversation was admitted not on the in-furtherance ground but rather as a declaration against interest, defendants argued that it should be excluded because it was a "completely exculpatory" statement, a characterization rejected by the court.

After the conversation was admitted in evidence, defendants challenged the accuracy of the government's interpretation of the tape and presented expert testimony to the effect that other sounds on the tape indicated that the "How much we got in" question referred to something other than Biaggi and that the mention of Biaggi was contained in a new thought. This interpretation is now offered in support of defendants' contention that the statement was not in fact against Esposito's interest. The defense expert's view, however, does not appear to have been before the court when defendants' initial objections were made, and on the basis of the record before it, the court was entitled to admit the conversation. Had the defendants come forward with their dispute of the content of the conversation before the tape was admitted, the court might well have excluded the tape on the ground that its

probative value was outweighed by the prejudice to defendants if it were admitted. *See* Fed. R. Evid. 403. Indeed, in summation, the government conceded that defendants' expert "might very well have been right" in his interpretation of the conversation. Given defendants' failure to provide the trial court with their present objection prior to admission of the tape, however, and given the lack of merit of the objections that were made, the court did not err in admitting the tape.

CONCLUSION

We have considered all of defendants' arguments on these appeals and have found them to be without merit. The judgments of conviction are in all respects affirmed.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of October one thousand nine hundred and eighty-eight,

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UNITED STATES OF AMERICA,

Appellee,

V

Docket No. 87-1484 and 87-1501

MARIO BIAGGI and MEADE ESPOSITO,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-Appellant MARIO BIAGGI and a letter petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the counsel for the Defendant-Appellant MEADE ESPOSITO,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk by
/s/Fredric Cassidy

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

– against –

MARIO BIAGGI and MEADE ESPOSITO,

Appellants.

NOTICE OF MOTION

30-day stay in issuance of mandate.

MOTION BY. *(Name, address and tel. no. of law firm and of attorney in charge of case)*

JOHN L. POLLOK, ESQ.
HOFFMAN & POLLOK
605 Third Avenue
New York, NY 10158
(212) 286-0300

Has consent of opposing counsel:

A. been sought? ☐ Yes ☐ No

B. been obtained? ☐ Yes ☐ No

Has service been effected? ☐ Yes ☐ No

Is oral argument desired? ☐ Yes ☐ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☐ No

B. by firm date of argument notice? ☐ Yes ☐ No

C. If Yes, enter date: _____

Judge or agency whose order is being appealed:

HON. JACK B. WEISTEIN

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

EDWARD D. MacDONALD
Attorney-In-Charge
Strike Force
Eastern District of New York
35 Tillary Street
Brooklyn, NY 11201

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

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Brief statement of the relief requested:

Pursuant to Rule 41(b), F.R.App.P., Appellant Mario Biaggi requests a 30-day stay of the mandate in this case pending application to the Supreme Court for a writ of certiorari.

Complete Page 2 of This Form

By: *(Signature of attorney)*

/a/John J. Pollok

Signed name must be printed beneath
JOHN J. POLLOK, ESQ.

Appearing for: *(Name of party)*

MARIO BIAGGI
Date: 10/12/88

Appellant or Petitioner:
☐ Plaintiff ☐ Defendant

Appellee or Respondent:
☐ Plaintiff ☐ Defendant

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
		MEMORANDUM
-against-	:	AND ORDER
		ON
MARIO BIAGGI and	:	PEREMPTORY
MEADE ESPOSITO,		CHALLENGES
	:	
Defendants.		CR 87-151 (JBW)
	:	

APPEARANCES:

For the Government:
ANDREW J. MALONEY
United States Attorney
BY: EDWARD A. MC DONALD
and
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WEINSTEIN, C.J.:

Defendants were convicted of either giving or receiving a thing of value. 18 U.S.C. §§ 201(f), (g). Both were also found guilty of violations of the Travel Act. 18 U.S.C. § 1952. In addition, defendant Mario Biaggi was convicted of obstruction of justice. 18 U.S.C. § 1503. Each defendant moved to set aside the verdicts on the ground that the prosecution had used its peremptory challenges discriminatorily to exclude Italian-Americans from the jury. As indicated in detail below, although the defendants were able to make out a prima facie showing of unconstitutional discrimination against Italian-Americans, the government proved that it did not purposefully exercise its challenges in a discriminatory manner.

I. FACTS

Defendants are well-known political figures. Mario Biaggi has been a member of the United States House of Representatives since 1968, and is now the senior congressman from New York City. Meade Esposito served eight terms as chairman of the Democratic Party in Brooklyn, until early 1984, and was one of the most powerful political leaders in New York State.

They were indicted after Mr. Biaggi exerted his influence to assist Coastal Dry Dock, a Brooklyn company and one of Mr. Esposito's insurance firm's largest clients, and Mr. Esposito agreed to pay for two vacations taken by Mr. Biaggi and a friend at the Bonaventure Resort and Spa in Ft. Lauderdale, Florida. The jury acquitted the defendants of bribery and corruption charges but convicted them of the offenses described above.

Both defendants are of Italian descent. At the voir dire, the prosecutor used his first five peremptory challenges to exclude veniremembers Joseph Angerome, Voir Dire Transcript at 30, 73 (hereinafter "V.D.Tr."); Frank Lauvicano, V.D.Tr. at 64-65, 74; Andrew Baccarella, V.D.Tr. 65, 78; Patricia Randazzo, V.D.Tr. at 78-79; and Louis Devito, V.D.Tr. at 31-82. After the fifth challenge, defense counsel suggested that the government's challenges had been used in "a consistent pattern of striking" jurors whose last names end in a vowel, apparently of Italian

descent." V.D.Tr. at 81. The prosecution used its next and last peremptory challenge to strike Lawrence Kern. V.D.Tr. at 76, 82. The prosecution also struck two alternate jurors, one of whom was Angela DiSanto. V.D.Tr. at 86. On the first day of trial, when juror no. 6 failed to appear, one alternate filled seat six and a new alternate was chosen. The government exercised its single challenge to exclude Dorothy Delbano. Trial Transcript at 15-22. Exercise and discussion of the challenges were conducted at sidebar in order to insulate the venire from potential taint.

At the close of voir dire, the defense made an application to dismiss the jurors and draw a new panel. V.D.Tr. at 89-93. In order to permit careful consideration of the issues involved, the court directed that a formal motion be made on written papers. *id.* By letter, the government presented an explanation for the exclusion of Louis Devito, a member of the Department of Sanitation, to which the defendants may both have had close ties. Because the defense sought time to inquire into the backgrounds of both the impaneled jurors and the excused jurors, V.D.Tr. at 92, and in anticipation of receiving the requisite full briefs from the parties, the court postponed decision until after trial.

Upon receiving the verdict, the court formally discharged the jury. Then it asked each to say, if the juror did not mind answering, whether he or she had any "Italian parentage or other Italian relationship." Trial Tr. at 2686. One of the jurors, Theresa Cataldo, had Italian parents and grandparents. Another, Catherine Lapreta, had an Italian father. Juror William McNichol had an Italian wife. Three other jurors had Italian brothers- or sisters-in-law, and a seventh juror had Italian stepchildren. Five jurors said they had no Italian relatives. Trial Tr. at 2686-87. Three of the jurors, Cataldo, Lapreta, and Franco, had names ending in vowels, although juror Franco said that his ancestry was Dominican and Spanish. Trial Tr. at 2687. Two of the jurors, both of whose names did not end in vowels, were black. After interviewing the jurors, the court renewed its direction that the parties submit comprehensive written memoranda

and affidavits on the motion and provide witnesses, if they wished, at an evidentiary hearing. Trial Tr. at 2638.

All parties submitted briefs on the issues. The government also submitted an affidavit setting forth the lead prosecutor's state of mind with respect to each of his peremptory challenges. The justifications relied upon by the government are discussed in Part IV, *infra*.

At the evidentiary hearing the two prosecutors who had participated in the voir dire were sworn. In response to defense questions, they explained in detail their reasons for employing each peremptory challenge. In essence they affirmed the declarations in the affidavit, with some elaboration. To this they added the important role of Italian-Americans in the prosecutor's office and in their personal lives.

Although this adversarial method of inquiry "do[es] in fact take more time, and [is] more cumbersome," the court pursued it because it "helps us get at the truth." *United States v. Thompson*, 827 F.2d 1254, 1259 (9th Cir. 1987). Defense counsel's active participation in the hearing is helpful to "point out to the district judge where the government's stated reason [for a peremptory challenge] may indicate bad faith," *id.* at 1260, and to "preserve for the record, and possible appeal, crucial facts bearing on the judge's decision," *id.* at 1261. Defense counsel's vigorous and dogged questioning of the prosecutors served both these purposes, at no great administrative cost.

II. DEFENDANTS' EQUAL PROTECTION CLAIMS

Although prosecutors have traditionally been able to employ peremptory challenges without stating their reasons, the Supreme Court has ruled that such challenges may not be used in furtherance of racial discrimination. In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the Court held that the Fourteenth Amendment's equal protection clause prohibits prosecutors from exercising peremptory challenges "in case after case" to exclude Black veniremembers on racial grounds "with the result that no Negroes ever serve on petit

juries." *Id.* at 223, 85 S.Ct. at 837. Two Terms ago, in *Batson v. Kentucky* — U.S. —, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), a case involving a black defendant, the Court reduced the defendant's evidentiary burden by holding that the defendant could make a prima facie showing of such discrimination against the defendant's "cognizable racial group" based purely on evidence concerning the defendant's own trial. *Id.* 106 S.Ct. at 1723-24.

In order to make a prima facie showing of discriminatory peremptory challenges under the equal protection clause, a defendant must show that members of his or her cognizable racial group were excluded from the venire, and that the facts raise an inference of purposeful racial discrimination.

> [T]he defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida*, [430 U.S. 482, 494, 97 S.Ct. 1272, 1275, 51 L.Ed.2d 498 (1977)], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, [345 U.S. 559, 562, 73 S.Ct. 891, 893, 97 L.Ed. 1244 (1953)]. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 106 S.Ct. at 1723.

Under this three-part test and on the basis of the "facts and other relevant circumstances," *Batson*, 106 S.Ct. at 1723, the defendants have established a prima facie case of discrimination in violation of the equal protection clause. Defendants' equal protection claims are applicable to the federal government through the Fifth Amendment due process clause.

> Although *Batson* involved a constitutional challenge based on the equal protection clause of the fourteenth amendment, it seems clear that the holding and rationale of that case should also be used to determine similar fifth amendment claims that are raised by defendants who have been tried in federal court. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

United States v. Dennis, 804 F.2d 1208, 1209 n.21 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 1973 (1987). *See also Johnson v. Robison*, 415 U.S. 361, 364 n.4, 94 S.Ct. 1160, 1164 n.4, 39 L.Ed.2d 389 (1974) ("Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment.").

A. *"Cognizable Racial Group"*

Each defendant was born in the United States to parents who had recently immigrated from Italy. Defendants characterize themselves, and others living in this country who share some ancestral connection with Italy, as "Italian-Americans." In particular, defendants assert that they and other Italian-Americans are, among other methods, identifiable by their last names, which commonly end in vowels. *See* V.D.Tr. at 81; Brief of Defendant Biaggi in Support of Motion for New Trial at 5.

In order to satisfy the first prong of the *Batson* three-part test, it must be shown that Italian-Americans constitute a "cognizable racial group." *Batson*, 106 S.Ct at 1723. The standard for determining cognizability for equal protection objections to peremptory challenges during jury selection under Batson is the one set out in *Castameda v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 1274, 51 L.Ed.2d 498 (1977), as is clear from the *Batson* Court's direct citation to *Castaneda*. *See Batson*, 106 S.Ct. at 1723. This standard defines as cognizable any group that is "a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Castaneda*, 430 U.S. at 494, 97 S.Ct. at 1274. *See also* United *States v. Dennis*, 804 F.2d 1208, 1210

(11th Cir. 1986), *cert. denied*, 107 S.Ct. 1973 (1987), (applying *Castaneda* test to *Batson* analysis).

The government urges that, instead of following *Castaneda*, the court should adopt the reasoning of the First Circuit in *United States v. Sgro*, 816 F.2d 30 (1st Cir. 1987), which found the evidence insufficient to establish that Italian-Americans are a "cognizable racial group" under *Batson*. There the First Circuit chose to borrow the cognizability standard developed for the Sixth Amendment requirement that the jury venire represent a fair cross-section of the population. *See Sgro*, 816 F.2d at 33 (employing the characteristics outlined in *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct 664, 58 L.Ed.2d 579 (1979), and *Barber v. Ponte*, 772 F.2d 982, 997 (1st Cir. 1985) (en banc)). The *Sgro* court's borrowing act is initially suspect because the Supreme Court in *Batson* quite clearly commanded that *Castaneda* govern its own use of the term "cognizable racial group." *See Batson*, 107 S.Ct. at 1723.

Furthermore, there is an important difference between the meaning of cognizability in these two different contexts. Discrimination against a group in the cross-section of the venire, in violation of the Sixth Amendment, may be demonstrated by mere statistical underrepresentation of that group. *See Duren*, 439 U.S. at 368 n.26. Discrimination in the use of peremptory challenges in violation of the equal protection clause, by contrast, necessitates a showing of the "essential element" of "discriminatory purpose." *Id.; see Batson*, 106 S.Ct. at 1723-24. Because discrimination in the venire under the Sixth Amendment is purely statistical, the definition of a "cognizable group" must be narrowly drawn lest any group imaginable by defense counsel be found numerically underrepresented. *See Barber*, 772 F.2d at 999 (en banc) (warning that "blue-collar workers, yuppies, Rotarians, Eagle Scouts, and an endless variety of other classifications" could receive protection)."

Because the guarantee against discrimination through peremptory challenges requires a showing of purpose, "cognizable racial groups" may be defined less rigidly, for it

is precisely the evidence of intentional exclusion of the group that helps to identify the group. The First Circuit itself made this distinction clear:

> That is not to say, however, that if a classification were *specifically* and *systematically excluded* from jury duty the same standard would be used as here, where defendant simply relies on a statistical disparity in the venires to challenge its constitutionality [under the fair cross-section rule]. If certain people are specifically and systematically excluded from jury duty, then the jury-administrating authority would have created its own group.

Barber, 772 F.2d at 999-1000 (en banc) (emphasis in original).

Even though the appropriate standard to be applied here is that adopted in *Castaneda*, *Sgro's* criteria are useful. In *Sgro*, the First Circuit opined that cognizable groups (1) are definable and limited by some clearly identifiable factor, (2) share a common set of attitudes, ideas or experiences, and (3) share a community of interests, such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process. *See Sgro*, 816 F.2d at 33.

Italian-Americans in this district satisfy the *Sgro* criteria. The court takes judicial notice of Italian-Americans' cognizability and of their commonly identifiable names. Judicial notice has often been employed to recognize groups as constitutionally cognizable. *See, e.g., Barber, supra*, 772 F.2d at 987, *rev'd*, 772 F.2d 997 (1st Cir. 1985) (en banc); *LaRoche* v. *Perrin*, 718 F.2d 500, 504 (1st Cir. 1983); *United States v. Butera*, 420 F.2d 564, 570 (1st Cir. 1970).

Defendant Biaggi through his counsel has also made the court aware of the opinion of linguistics experts that the struck jurors' last names are clearly Italian-American. *See* Attorney's Affirmation in Support of Motion for New Trial at 5. These observable, distinguishable names constitute a clearly identifiable factor separating Italian-Americans from most other ethnic groups.

These names emanate from Italian ancestors who immigrated to this country and who constitute a discrete resource from which Italian-American heritage has been passed down.

Italian-Americans share a common experience and background in their links to Italian families, Italian culture, and Italian group loyalties, and often share the same religious and culinary practices. The court takes judicial notice that Italians have been subject to stereotyping, invidious ethnic humor and discrimination. *See Snell v. Suffolk County*, 611 F.Supp. 521 (E.D.N.Y. 1985), *aff'd*, 782 F.2d 1094 (2nd Cir. 1986). *See also* Regents of the University of California v. Bakke, 438 U.S. 265, 292 & n.32, 98 S.Ct. 2733, 2749 & n.32, 57 L.Ed.2d 750 (1978) (Opinion of the Court per Powell, J.) (" '. . . Italians . . . continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin.' 41 C.F.R. § 60-50.1(b) (1977)."); *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 235 (5th Cir. 1977) (Wisdom, J., dissenting) (noting that Americans of Irish, Italian, Jewish [and] German extraction" have been subjected to "undoubted past societal discrimination").

Like any group recently emigrated from a cohesive ethnic nationality, Italian-Americans share numerous common "threads" of attitudes, ideas and experiences, often including largely intertwined family relations in the country of origin. Finally, Italian-Americans have a community of interests: they generally share certain cherished values received through generations of Italian civilization and religion, including values relevant to moral culpability. Across the board exclusion of this group could not but impair the representation of these interests in juries.

The decision in *Sgro* is not to the contrary. There, the court simply thought the evidence insufficient for a finding that Italian-Americans are a cognizable group. *See United States v. Sgro*, 816 F.2d 30, 33 (1st Cir. 1987). Here, the court finds, on the basis of all the "facts and any other relevant circumstances," *Batson*, 106 S.Ct. at 17-23, and taking judicial notice of such other facts as necessary and appropriate, that there is a sufficient showing to categorize Italian-Americans as cognizable.

Alternatively, Italian-Americans are a "cognizable racial group" under the less restrictive *Castaneda* standard more properly applied to the present *Batson* inquiry into purposeful discrimination by peremptory challenges. Italian-Americans are "recognizable" and "distinct," and appear to have been "singled out for different treatment under the laws, as written or applied." *Castaneda v. Partida* 430 U.S. 482, 494, 97 S.Ct. 1274, 1280, 51 L.Ed.2d 498 (1977). Italian-Americans share a common ancestry in Italy, a common cultural and religious heritage there and here, and they often still share a common language. They are identifiable, in part, by their characteristic last names. The court takes judicial notice that Italian-Americans are considered in this district to be a recognizable and distinct ethnic group, commonly identified by their last names and by their neighborhoods. These qualities are sufficient to render Italian-Americans no less cognizable than the other groups who have already been recognized as cognizable for equal protection purposes. *See, e.g. Castaneda*, 430 U.S. at 495, 97 S.Ct. at 1280 (Mexican-Americans are cognizable because "Spanish surnames are just as easily identifiable as race"); *Hernandez v. Texas*, 347 U.S. 475, 479, 74 S.Ct. 667, 671, 98 L.Ed. 866 (1954) (Mexican-Americans are a distinct class because the "attitude of community" was to distinguish between them and "whites"); *Roman v. Abrams*, 822 F.2d 214 (2nd Cir. 1987) (white persons constitute a cognizable group); *United States v. Chalan*, 812 F.2d 1302, 1313-14 (10th Cir. 1987) (summarily finding American Indians to be a cognizable group under *Batson*).

Italian-Americans are also shielded by the equal protection clause's prohibition against discrimination on the basis of ancestry. *See Saint Francis College v. Al-Khazraji*, — U.S. —, 107 S.Ct. 2022, 2028 & n.5 (1987); *Hernandez, supra*, 347 U.S. at 479, 74 S.Ct. at 671; *Oyama v. California*, 332 U.S. 633, 646, 68 S.Ct. 269, 275, 92 L.Ed. 249 (1948); *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943). In *Hernandez*, the Court held unconstitutional the ancestry-based exclusion from juries of Mexican-Americans, and rejected the notion that only two "racial" groups, white and black, are deserving of equal protection. Rather, "[t]he exclusion

of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment." *Hernandez*, 347 U.S. at 479, 74 S.Ct. at 671. Italian-Americans' shared ancestry is easily visible in their Italian surnames, just as Mexican ancestry has been found readily apparent from surnames alone. *See Castaneda*, 430 U.S. at 495, 97 S.Ct. at 1280.

Finally, the definition of "cognizable racial groups" under *Batson* cannot reasonably be restricted to exclude ethnic minorities. It is now recognized that the legislation enacted shortly after the Civil War to prohibit race discrimination, including the enabling legislation of the equal protection clause of the ourteenth Amendment, was intended to protect a variety of groups not now labeled "races." After its decision in *Batson*, the Supreme Court decided that this enabling legislation, codified at 42 U.S.C. §§ 1981 and 1982, protects a variety of ethnic minorities from "race discrimination." *See Saint Francis College v. Al-Khazraji*, — U.S. —, 107 S.Ct. 2022 (1987) (Arabs are protected under § 1981); *Shaare Tefila Congregation v. Cobb* — U.S. —, 107 S.Ct. 2019 (1987) (Jews are protected under § 1982). These decisions established that although Jews and Arabs are not now recognized as racial groups, the question is whether the enacting Congress in 1870 intended to protect them from discrimination. Relying on both dictionary definitions of "race" from the period and the legislative history of the statutes, the Court concluded that "Jews and Arabs were among the peoples then considered to be distinct races and hence within the protection of the statute." *Shaare Tefila*, 107 S.Ct. at 2022.

Reviewing the scholarly definitions of race from the "middle years of the 19th century," the Court found a virtual consensus that race at that time meant ethnic or ancestral affiliation. *See St. Francis*, 107 S.Ct. at 2026-27. For example, "[t]he 1863 version of the New American Cyclopedia . . . identified numerous other groups as constituting races, including Swedes, Norwegians, Germans, Greeks, Finns, *Italians*, Spanish, Mongolians, Russians, and the like." *Id.* at 2027 (citations omitted) (emphasis supplied). The Court's research disclosed that

only in this century have "races" been divided physiognomically into three classifications, Caucasian, Mongoloid, and Negroid; even this taxonomy is merely a "popular understanding" thought to be "arbitrary and of little use" by many "modern biologists and anthropologists." *Id.* at 2026 & n.4.

Legislative history of the post-Civil War statutes provides corroborative support for the view that "races" then included "immigrant groups" coming from each foreign nation. *St. Francis*, 107 S.Ct. at 2028. The Court summarized:

> [W]e have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subject to intentional discrimination solely because of their ancestry or ethnic characteristics.

Id. It can therefore be confidently concluded that the Court in *Batson* meant "cognizable racial groups" to include a variety of ethnic and ancestral groups subject to intentional discrimination, including Italian-Americans.

This process of defining racial groups evokes abhorrent images of policies pursued by the Nazis and other enemies of humanity. Yet, as is true in other areas of our law, we must somehow identify those who need defense. We must take care to apply these definitions in the interest of protection, lest they be wielded by the apologists of intolerance and racism. Ultimately, should there be any question remaining, whether Italian-Americans fall on one side or the other of the elusive line encircling the set of protected "cognizable racial groups," courts must err on the side of cognizability. The Supreme Court has instructed that "[i]n light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few." *Peters v. Kiff*, 407 U.S. 493, 505, 92 S.Ct. 2163, 2169, 32 L.Ed.2d 83 (1972).

B. Inference of Purposeful Discrimination

The second prong of the *Batson* test is not really a test at all, but provides that "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' " *Batson*, 107 S.Ct. at 1723 (citation omitted).

The third prong requires the defendant to "show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.* The Court expressed its "confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges "constitute grounds for such an inference, based on the trial court's consideration of "all relevant circumstances." *Id.*

The prosecutor used his first five peremptory challenges to strike jurors with apparent Italian surnames. After the defense made its application on *Batson* grounds, the prosecutor used his last peremptory challenge to strike an evident non-Italian. Later, the prosecutor used two of his challenges of alternates to exclude two Italian-named individuals. This conduct constitutes a "pattern" of strikes sufficient to raise an inference that the prosecutor sought to exclude venirepersons on the basis of their Italian-American affiliation. *See Batson*, 106 S.Ct. at 1723. Accordingly, the defense made out a prima facie showing of discrimination.

The fact that the prosecutor did not use his sixth challenge against an Italian surname is of little moment. Cases finding no prima facie showing on the ground that the prosecutor failed to use all of his strikes against members of the group are inapposite because none involve a prosecutor who used strikes against the group until the moment the practice was flagged by the defense. *See, e.g., United States v. Porter*, — F.2d —, Slip op. Nos. 87-1085, 87-1086 (8th Cir. Oct. 7, 1987) (available on Westlaw Oct. 16, 1987) (finding no prima facie case where

prosecutor struck one of two blacks and accepted the other); *United States v. Montgomery*, 819 F.2d 847 (8th Cir. 1987) (finding no prima facie case where prosecutor used two of six strikes against blacks, and accepted a jury panel with two blacks remaining on it); *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 1973 (1987) (finding no prima facie case where prosecutor used three of six strikes against blacks, and accepted a jury panel with two blacks remaining on it); *Fleming v. Kemp*, 637 F.Supp. 1547 (M.D.Ga. 1986) (finding no prima facie case where prosecutor used eight of ten strikes against blacks, and accepted a jury panel with two blacks remaining on it); *cf. Clark v. City of Bridgeport*, 645 F.Supp. 890 (D.Conn. 1986) (finding prima facie case where city attorney used all his available challenges to strike all blacks from the jury). Furthermore, the prosecutor here did use an additional challenge to strike two Italian-Americans from the alternate jury venire, even after the defense's motion was first made. These strikes provide some additional evidence of a "pattern" of discriminatory challenges.

III. DEFENDANTS' SIXTH AMENDMENT CLAIMS

Soon after the Supreme Court decided *Batson*, the Second Circuit adhered to its own view, first announced in *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded*, ____U.S.____, 106 S.Ct. 3289, 92 L.Ed.2d 705 (1986), *appeal dismissed per stipulation*, No. 84-2026 (2d Cir. Oct. 23, 1986), that the Sixth Amendment similarly "does protect [the defendant] against the state's discriminatory use of peremptory challenges in such a way as to eliminate even the possibility that the petit jury could reflect a cross section of the community." *Roman v. Abrams*, 822 F.2d 214, 224-25 (2d Cir. 1987) (reconsidering *McCray* in light of *Batson* and concluding that *McCray's* Sixth Amendment analysis remains "the current law of this Circuit").

The Sixth Amendment analysis of peremptory challenges required by the Second Circuit does not differ from the equal protection analysis described above. The prima facie showing "adopted by the Court [in *Batson*] for evaluation of the defendant's equal protection claim was essentially the same [as the

one the Second Circuit] had set out in *McCray* for evaluation of such a claim under the Sixth Amendment." *Roman*, 822 F.2d at 225. *McCray* required,the defendant to show that:

> in his case, (1) the group alleged to be excluded is a cognizable group in the community, and (2) there is substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venirepersons' group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.

McCray, 750 F.2d at 1131. Thus, the prima facie findings set forth above, that Italian-Americans are for these purposes a cognizable group who appear to have been excluded from the jury, and that the evidence is sufficient to raise the inference that the exclusion was based on the struck venirepersons' Italian-American affiliation, are also sufficient to make out a prima facie case under the Sixth Amendment.

IV. JUSTIFICATION FOR PROSECUTOR'S CHALLENGES

The successful presentation of a prima facie case does not end the matter. In response to the prima facie case, the government must justify its use of peremptory challenges. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 106 S.Ct. at 1723. For each challenge found by the court to have been prima facie discriminatory, the prosecutor must "articulate a neutral explanation related to the particular case to be tried." *Id.* Each explanation must be a " 'clear and reasonably specific' explanation of [the prosecutor's] 'legitimate reasons' for exercising the challenges," *id.* at 1723 n.20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981)). In rebutting the prima facie case of discrimination, the prosecutor may not merely assert his "good faith" or absence of discriminatory motive in making the challenges, nor may he rebut based on his "assumption — or his intuitive judgment — after [the jurors]

would be partial to the defendant because of their shared race." *Id.* at 1723 (citations omitted). Although the prosecutor must therefore produce substantive and race-neutral reasons for his challenges, the Court "emphasize[d] that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Id.* at 1723.

The prosecutor's explanations, together with the other relevant facts regarding the use of challenges, are then to be considered by the trial court in order "to determine if the defendant has established purposeful discrimination." *Id.* at 1724 (footnote omitted). This determination is a " 'finding of fact' entitled to appropriate deference by a reviewing court. Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court should give those findings great deference." *id.* at 1724 n.21 (citations omitted).

After careful consideration of the prosecution's affidavit, its answers under oath to defense counsel's questioning at the hearing on October 20, and the relevant facts surrounding the jury selection, the court finds the prosecution's explanations credible, neutral and legitimate. Normally preliminary matters must be proved by a preponderance of the evidence. *See Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). In this case the court is satisfied beyond a reasonable doubt that the prosecutors did not engage in purposeful discrimination.

Each of the prosecutor's challenges was exercised for permissible reasons. Joseph Angerome was struck on several grounds: he became unusually angry at the court clerk's mispronunciation of his name, see McDonald Affidavit at 9; he had voted for Mr. Biaggi in an election, *see id.*; and he had been employed in the Post Office, which might have led him to sympathize with Mr. Biaggi, himself a onetime postal worker and public advocate of civil servants' causes, *see id.* at 9-10. In addition, the prosecution's most serious concern in jury selection was avoiding jurors who thought the vacation gifts involved would be

de minimis, see Transcript of Hearing on italian-Americans Motion at 49-54 (testimony of Mr. Michaels) (hereinafter "Hearings"), and the prosecution believed that employees of the Post Office often take Christmas gifts of cash and would more likely condone such gifts, see McDonald Aff. at 10.

Frank Lauvicano was excluded because he wore a disrespectful T-shirt, depicting horses and advertising the Saratoga race track. On the basis of the T-shirt and Mr. Lauvicano's demeanor, the prosecution considered Mr. Lauvicano to be arrogant, insufficiently serious about jury duty in federal court, and even disdainful of the process. See McDonald Aff. at 10; Hearings at 26-29. The lead prosecutor could not recall having seen a veniremember wearing a racetrack T-shirt in any previous jury selection. *See* Hearings at 29 (testimony of Mr. McDonald).

The government removed Andrew Baccarella because his wife worked for a printing company on Long Island, and could quite possibly have been influenced by Mr. Esposito's close connections to that industry in that locale. *See* McDonald Aff. at 10-11.

Patricia Randazzo was excluded in part based on her hostile reaction to the prosecution's request that the court ask her certain extra questions at voir dire. The prosecutor, at sidebar, requested that the court inquire whether she was related to the proprietors of Randazzo's Restaurant, whose owners were longtime friends of Mr. Esposito. After the question (to which she answered "no"), Mrs. Randazzo appeared to stare angrily at the prosecutor, perhaps in embarrassment over having been one of the few veniremembers singled out for a specific question. See McDonald Aff. at 12-13; Hearings at 33-35. In addition, Mrs. Randazzo's husband was a retired police officer who had been in the police department about the same time as Mr. Biaggi, and Mr. Biaggi's wide reknown and extraordinary prestige as a police officer, and his past executive office in the Patrolmen's Benevolent Association, suggested to the prosecution that Mrs. Randazzo would sympathize with the defendant. See McDonald Aff. at 12-13; Hearings at 35-36.

The strike against Louis Devito was justified by Mr. Devito's employ as a foreman in the New York City Department of Sanitation: both defendants appeared to have ties to the Department and to its union. Mr. Esposito was close friends with officials of both the Department and the union, and his insurance and printing firms had done work for the union. Mr. Biaggi's law firm had represented the union during the past few years. *See* McDonald Aff. at 11-12; letter from Mr. McDonald to the court, dated August 27, 1987, and attached as exhibit to McDonald Aff.; Hearings at 32-33.

The government's reasons for striking the two alternate prospective jurors were also legitimate. Angela DiSanto was removed because she was active in organizations in which Mr. Biaggi was probably a leading officer or by which he had probably been honored. See McDonald Aff. at 13; Hearings at 36-38. The fact that these organizations primarily promoted Italian-American interests does not contaminate the strike, because the prosecution made clear that it was striking based on the common allegiance to the organizations, whatever type they might be, and not based on common ethnic heritage. See Hearings at 47-48. "If they had been members of a Sherlock Holmes Organization or something . . . and the defendants had also been members or at least honored by or affiliated with these organizations I would have wanted to exclude her on that basis as well." Hearings at 47-48 (testimony of Mr. McDonald).

Finally, Dorothy Delbano was removed because of her flippant attitude and discourteous responses to questions. The government felt she seemed annoyed and uninterested in the jury process, and would not make an earnest juror. *See* McDonald Aff. at 13; Hearings at 39-40.

These strikes must all be seen in the context of a federal voir dire. The attorneys do not generally ask questions, but submit questions to the judge, who then asks the questions of the veniremembers. In contrast to the state court voir dire available in *Batson*, the parties here glean much less detailed information about each veniremember. They therefore are forced to rely

more on inference and assumption than would counsel with full data on the venire.

Strikes should also be analyzed by comparing them with those who were not struck. The government accepted a jury panel including Ms. Lapreta, Ms. Cataldo, and Mr. Franco, all of whom have potentially Italian-sounding names. The prosecutor testified that he also believed the juror named Cutter to have had some Italian background, based on Cutter's facial features and home neighborhood, and the possibility that his last name had originally been Italian. See Hearings at 26-27. The alternates accepted by the government included Louis Ruggiero.

The government's explanations were not mere assertions of good faith. They were neutral, specific and reasonable explanations substantiating legitimate exclusions of each of the veniremembers removed. *See Batson,* 106 S.Ct. at 1723-24. Although the explanations do not rise to the level that would justify a removal for cause, the Constitution does not require peremptory challenges to be so well founded. *See id.* at 1723. As long as peremptory challenges remain a feature of our jury selection system, they will necessarily contain a component that is somewhat unconstrained and colored by intuition. Only by eliminating peremptory challenges altogether can every challenge be made accountable to the trial judge; that choice, desirable or not, has not yet been made by the Supreme Court. *See id.* at 1726-29 (Marshall, J., concurring).

The suggestion of purposeful discrimination is further rebutted by the actual composition of the resulting petit jury. The jury contained at least two members, Cataldo and Lapreta, who were of Italian descent, and seven of the twelve jurors had some close family relation of Italian descent. *See* Trial Tr. at 2686-87. It constituted an excellent cross-section of the Eastern District of New York by ethnic background, race, sex, education, agents, experience and geography. In particular, in Kings County, New York, where the case was tried, approximately 15% of the population reports itself as of Italian ancestry. *See 1980 Census of Population, Census Tracts: New York, NY-NJ SMSA* (U.S. Department of Commerce, Bureau of the Census, 1983), Table

P-8, p. P-558. The figure is similar for the New York Metropolitan Area, *see id.* (calculated as the New York part of the NY-NJ SMSA), and slightly higher for Nassau County, New York, *see Nassau County Data Book* (Nassau County Planning Commission, 1985), Table 53, p.273 (reporting 1980 U.S. Census data). The jury chosen here had at least two of twelve members with Italian ancestry, for a minimum representation of 16.67%. These data show the jury's close proportionate representation of the available venire pool, bolstering the conclusion that the prosecution did not strike an inordinate number of Italian-Americans in an effort to discriminate against them.

Beyond serving as corroborative evidence, the prosecution's failure to distort the actual representation of Italian-Americans on the jury is itself a shield against the defendants' claims. Such failure, at least in this Circuit, essentially precludes the defendant from prevailing on a claim that peremptory challenges have been used discriminatorily. In a case in which it held that the equal protection right announced in *Batson* is also guaranteed by the Sixth Amendment, the Second Circuit wrote that

> if the prosecutor has succeeded in excluding a cognizable group from the jury by the discriminatory use of his peremptory challenges, the defendant's constitutional right has been impaired. In such a case, a defendant is entitled to have his conviction set aside and to receive a new trial.
>
> Where, however, the actions of the prosecutor have not succeeded in excluding the targeted group and have not reduced the petit jury representatives of that group *dramatically below* the group's percentage in the venire or in the population of the community, it is difficult to see that the defendant has indeed been denied the possibility that the Sixth Amendment guaranteed him.

Roman v. Abrams, 822 F.2d 214, 229 (2nd Cir. 1987) (emphasis supplied). Absent a shortfall in the actual representation of a cognizable group, the defendant cannot obtain a new trial.

Defendants urge that *Roman* requires the trial court to act "during the jury selection process" to remedy discrimination. But *Roman* makes clear that such early action by the trial judge is only available when the prosecutor "has succeeded" in excluding the group; when the prosecutor has not "succeeded in . . . dramatically" reducing the group's representation on the jury, no remedy is required. *Id.* at 229. In the present case the defense did not submit adequate motion papers until after trial. *See* Trial Tr. at 2-4; *id.* at 2688.

The jury actually empaneled had every reason to sympathize with the defendants on the basis of their good works for a wide variety of ethnic groups. Evidence presented at trial showed that both defendants were active in ethnic clubs and associations; that both devoted long periods of public service to the gamut of ethnic groups among their constituencies; and that through direct and indirect assistance, the defendants were constantly furthering the special interests of Italians, Irish, Hispanics, Blacks, Jews, and other ethnic groups. Mr. Esposito is a life member of the NAACP. He has received awards from, among other organizations, the Italian Business and Professional Men's Associations, the United Jewish Appeal, the Federation of Jewish Philanthropies, the Anti-Defamation League, B'nai Brith, the International League for the Repatriation of Russian Jews, the Chinese Community of New York, and the March of Dimes, and he was named man of the year of the Hispanic Organizations. *See* Trial Tr. at 2157-60. Congressman Biaggi is widely known for his efforts on behalf of the Italians, the Irish in Northern Ireland, Soviet Jewry, and the victims of apartheid. *See* Trial Tr. at 2283. Each juror could not but feel moved by one or more of the defendants' many generosities on behalf of a group with whom the juror was associated.

V. CONCLUSION

The Supreme Court has held that the equal protection clause, applicable to federal prosecutions through the Fifth Amendment, prohibits purposeful discrimination against a defendant's cognizable racial group in the exercise of peremptory challenges. *See Batson v. Kentucky, supra*, 106 S.Ct. 1712, 1723-24 (1986). The Sixth Amendment approach of this Circuit rests on the provision that "an accused shall enjoy the right to . . . trial by an impartial jury . . ."; as interpreted, this clause implies a cross-section of the community "from which distinctive groups" are not "systematically excluded." *McCray v. Abrams, supra*, 750 F.2d 1113, 1116 (2d Cir. 1984). *See also Roman v. Abrams, 822 F.2d 214, 225 (2d Cir. 1987) (reaffirming after Batson that McCray* remains "the current law of this Circuit").

The tests for a prima facie case of discrimination under *Batson* and *McCray* are nearly identical, and both the Supreme Court and the Second Circuit permit proof of a violation to be limited to the single case in issue. Here the defendants made a prima facie case under both standards, but upon consideration of the prosecution's reasons for its challenges and of the relevant surrounding circumstances, the jury selection complied with both the equal protection and the Sixth Amendment clauses. There was no purposeful discrimination in the exercise of the challenges and the challenges did not distort the cross section of the community. The jury was fairly chosen and fairly representative.

The motion to set aside the verdict is DENIED.

So ordered.

Dated: Brooklyn, New York
November 6, 1987

Jack B. Weinstein, Chief Judge, E.D.N.Y.

UNITED STATES of America, Plaintiff,

v.

Mario BIAGGI and Meade Esposito, Defendants.

No. 87-CR-151.

United States District Court,
E.D. New York

Nov. 25, 1987.

Defendants were convicted of illegally giving and receiving a thing of value and of violation of the Travel Act. On defendants' motion to set aside the verdict, the District Court, Weinstein, Chief Judge, held that reference to bribery in the Travel Act applies to all crimes enumerated under federal statute governing bribery of public officials and witnesses, including crimes requiring only proof that thing of value was given "for or because of" an official act.

Motion denied.

Andrew J. Maloney, U.S. Atty. by Edward A. McDonald, Attorney-in-Charge and Leonard Michaels, Sp. Attys., U.S. Dept. of Justice, Brooklyn, N.Y., for U.S.

Slotnick & Baker by Barry I. Slotnick, Richard A. Medina, New York City, for defendant Mario Biaggi.

Spengler Carlson Gubar Brodsky & Frischling by Edward Brodsky, Thomas H. Sear, Lawrence S. Hirsh, New York City, for defendant Meade Esposito.

MEMORANDUM AND ORDER

WEINSTEIN, Chief Judge:

Defendants were convicted of giving and receiving a thing of value "for or because of" an official act in violation of 18 U.S.C. § 201(f) and (g), and of interstate travel in aid of unlawful activity in violation of 18 U.S.C. § 1952 (the "Travel Act"). They were acquitted of giving and receiving a thing of value "corruptly" with "intent to influence" official action in violation of 18 U.S.C. § 1952 (the "Travel Act'). They were acquitted of giving and receiving a thing of value "corruptly" with "intent to influence" official action in violation of 18 U.S.C. § 201(b) and (c). Over the defendants' objection, the jury was instructed that a Travel Act conviction could be predicated on a violation of section 201(f) and (g) alone. The defendants now move to set aside the verdict.

The Travel Act provides that "[w]hoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, . . . with intent to . . . promote, . . . establish, carry on, or facilitate the promotion, . . . establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform [any unlawful activity]," shall be guilty of a crime. 18 U.S.C. § 1952(a). "Unlawful activity" is defined to include "bribery . . . in violation of the laws of the United States." Section 201, under which defendants were convicted, is entitled "Bribery of public officials and witnesses." The relevant provisions read as follows prior to the 1986 amendments:

> § 201. Bribery of public officials and witnesses
>
> . . . .
>
> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . or offers or promises any public official . . . to give anything of value to any other person or entity, with intent —

(2) to influence any official . . . to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commmission of any fraud, on the United States . . . [shall be guilty of a crime].

(c) Whoever, being a public official . . . directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States . . . [shall be guilty of a crime]. . . . .

(f) Whoever, otherwise then as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promiseis anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . . [shall be guilty of a crime].

(g) Whoever, being a public official . . . otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . . [shall be guilty of a crime].

Defendants claim that the reference to bribery in the Travel ACt does not apply to all of the crimes enumerated under section 201. They argue that only the paragraphs which require proof of corrupt intent to influence an official act, and not the paragraphs which require only proof that a gratuity was given "for or because of" an official act, can constitute the predicate offense of bribery under the Travel Act.

As with the majority of statutory construction issues, it is a near certainty that no congressperson who voted on the measure ever thought about the question now before this court. In *Perrin v. United States*, 444 U.S. 37, 100 S.Ct. 311, 62 L.Ed. 2d 199 (1979), the Supreme Court pointed out that the legislative history of the Travel Act is sparse, and it is apparent from the floor debates that "Congress made no attempt to define the statutory term 'bribery,' but relied on the accepted contemporary meaning." 444 U.S. at 45, 100 S.Ct. at 315-16, citing *Rewis v. United States*, 401 U.S. 808, 811, 91 S.Ct. 1056, 1059, 28 L.Ed. 2d 493 (1971). Following the lead of the *Perrin* Court, we look first to sources likely to reflect the accepted contemporary meaning of the word "bribery" as it was understood in 1962 when section 1952 was enacted.

Dictionary definitions in the main support the defendants' position that the common meaning of the word bribery is the giving of a thing of value corruptly and with intent to influence a specific official act. *See, e.g., Webster's New International Dictionary* 333 (Second Edition 1960) ("act of influencing the action of another by corrupt inducement"); *The Oxford English Dictionary* 373-74 (Compact Edition 1971) ("the act . . . of giving or accepting money or some other payment with the object of corruptly influencing the judgement or action"); *The American Heritage Dictionary of the English Language* 164 (1969) ("anything . . . offered or given to someone in a position of trust to induce him to act dishonestly"); *Black's Law Dictionary* 173 (5th Edition 1979) ("the offering, giving, receiving or soliciting of any thing of value to influence action as an official or in discharge of . . . public duty"); *Ballentine's Law Dictionary* 155 (3rd Edition 1969) ("the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done or with the corrupt intent to influence the action of any other person professionally concerned with the administration of public affairs").

Scholars and commentators who have analyzed the crime of bribery, however, recognize the elusiveness of a precise definition of it, and have been more willing to afford it a broad scope. The treatises which define bribery do not consistently require

corrupt intent to influence as an element of that offense. One does state that "a corrupt intent to influence, or be influenced in, the discharge of official duties is a necessary element of the crime of bribery." 12 Am.Jur.2d *Bribery* § 6 (1984). But another implies that the wording of the statute is dispositive on whether corrupt intent is required, stating *"except where bribery is made indictable irrespective of guilty knowledge*, it is essential to the offense that the offer, promise, or gift be made or accepted with the corrupt intent to influence the action of the officer in the discharge of his official duties." 11 C.J.S. *Bribery* § 2 (1938) (emphasis added). Similarly, one commentator noted that while "bribe" usually connotes corruption, "the lines between a tip and a bribe sometimes blur," particularly in circumstances where the bribe is given to a public official. Driscoll, The Illegality of Bribery: Its Roots, Essence, and Universality. 14 Cap.U.L. Rev. 1, 5 n. 14 (1984).

Also relevant in determining the commonly understood meaning of bribery are state law definitions. While bribery under state statutes has traditionally required an element of corruption, at the time the Travel Act was being debated there was already a trend away from including the term "corrupt" in state law definitions of the crime, although most state statutes still require some element of intent to influence for conviction under the most serious form of bribery. At its 1962 meeting, the American Law Institute approved the elimination of the word "corrupt" from its definition of bribery, a change adopted by a great majority of states in revisions and proposed revisions of their bribery statutes. *See* Model Penal Code § 240.1, note 2 (1980), citing Ark. § 41-2703; Colo. § 18-8-302; Conn. §§ 53a-147, -148, -152, -153; Del. tit. 11, §§ 1201, 1203, 1264, 1265; Ga. § 26-2301; Haw. §§ 710-1040, -1073; Idaho § 18-1352; Ill. ch. 38, § 33-1; Ind. § 35-44-1-1; Iowa §§ 722.1, .2; Kan. § 21-3901; Ky. § 521-020; La. § 14:118; Me. tit. 17A, § 602; Minn. § 609.42; Mo. § 576.010; Mont. § 94-7-102; Neb. §§ 28-917, -920; N.H. § 640:2; N.J. § 2C:27-2; N.M. §§ 40A-24-1, 12; N.Y. §§ 200.-00, .04, .15, .20; N.D. § 12.1-12-0.1; Ore. §§ 162.015, .025; Pa. tit. 18, § 4701; P.R. tit. 33, §§ 4360, 4363; S.D. §§ 22-12A-6, -7, -11; Tex. § 36.02; Utah §§ 76-8-103, -105; Va. § 18.2-447; Wash. § 9A.68.010; W.Va. § 61-5A-3; Cal. (p) S.B. 27, §§ 14301, 14302; Mass. (p) ch. 268A, §§ 2, 3; Mich. (p) § 4705; S.C. (p) §§ 20.18, .33; Tenn (p) ch. 21, § 2102; Vt. (p) § 2.30.2; W.Va. § (p) 61-9-11.

More persuasive than these extrinsic definitions of bribery are those contained in the federal bribery law itself. Congressional understanding of bribery as a broadly-defined offense not necessarily requiring corrupt intent to influence can be inferred from the fact that section 201 on its face included both the paragraph (b) and (c) "corrupt intent" offenses and the paragraph (f) and (g) "for or because of" offenses under the common heading of "bribery." This fact alone was enough to convince the court in *U.S. v. Evans*, 572 F.2d 455 (5th Cir.1978), that sections (f) and (g) are encompassed by the term "bribery" as it is used in the Travel Act. In that case, the court denied the defendants' motion to set aside the Travel Act conviction on the ground that it was inconsistent with a conviction under section 201(g) and acquittal under paragraph (c) – the same motion now made by defendants in the case at bar. The *Evans* court relied on the fact that the Travel Act count had charged "bribery and attempted bribery" under section 201 "without mention of a specific subsection," implying that the court considered all of the section 201 subsections to constitute bribery offenses.

Defense contentions that paragraphs (f) and (g) were enacted after the Travel Act, and cannot therefore be used in determining the intended definition of bribery under that statute are unpersuasive. Although the Travel Act was passed in 1961 and the revisions of the bribery law were passed in 1962, the provisions were considered and enacted by the same congress. In the House, the two measures were discussed and debated for the most part contemporaneously. Attorney General Kennedy's testimony before the House Judiciary Committee on May 17, 1961 in support of the proposed Travel Act came just three weeks after the President submitted his message to the same Congress advocating revisions in the bribery statutes. H.R.Rep. Nos. 966, 87th Cong., 1st Session. And on August 21, 1961, when the House of Representatives passed a revised version of the Travel Act, it had already voted ten days earlier to adopt a measure consolidating the bribery laws into section 201 and to entitle that section "Bribery of public officials and witnesses."

The sequence in which these measures were passed is in any event of little moment, because the enactment of paragraphs

(f) and (g) did not mark the first time that Congress included an offense that did not require corrupt intent to influence under the rubric of the bribery laws. The pre-1961 bribery statutes drew even less of a distinction between the two levels of mens rea than did the new section 201, often lumping the two together as the same offense and punishing them identically. In the 1958 edition of the United States Code, sections 206 and 207 criminalized the offering of a thing of value "because of *or* with intent to influence" a judge's decision, and receipt by such judge of the thing of value "because of *or* with intent to influenced" (emphasis added). This meant that a defendant found to have given an unlawful thing of value would be guilty of a bribery offense even absent a finding of "intent to influence" (the language of what are now paragraphs (b) and (c)), so long as the thing of value was given "because of" an official act (the language of what are now paragraphs (f) and (g)). Similarly, section 208 prohibited the receipt by a juror of any money or thing of value "because of or with intent to be influenced" in his vote. Moreover, the bribery statute as it existed in 1961 used the term "bribe" rather loosely, without consistently imputing to it the requirement of corrupt intent to influence. Both sections 206 and 207 described the thing of value which was forbidden to be given "because of" an official act as a "bribe."

The legislative history of the new section 201 suggests that Congress did not view the measure as substantially changing the definition of bribery as it was understood at that time, but rather saw it as clarifying and consolidating the bribery laws as they currently existed. Senator Kefauver, a member of the Committee on the Judiciary, noted that the measure was intended to "consolidate into a single section . . . the various existing bribery statutes," a consolidation which was to "make[] no significant changes of substance," and "would not narrow the broad sweep of the current bribery laws." 87 Cong.Rec. 21,981 (October 3, 1962). In moving for passage of the reform measure, Congressman Celler, the Chairman of the House Judiciary Committee, remarked, "This consolidation renders uniform the law describing a bribe and prescribing the intent or purpose which makes its transfer unlawful, and makes penalties more uniform." 107 Cong.Rec. 14,774 (August 7, 1961). Congressman McColloch

stated at the conclusion of Congressman Celler's remarks that "the object of the Committee was to bring uniformity into the law, both with respect to the criminal conduct which constitutes bribery and the penalty for the offense." 107 Cong. Rec. 14,778 (August 7, 1961). *See also* S.Rep.No. 2213, 87th Cong., 2nd Session ("Section 201 would bring all these [bribery] categories within the provision of one section and make uniform the proscribed acts of bribery, as well as the intent or purpose making them unlawful.").

There is no reason to infer that the policy and purpose behind the "corrupt intent to influence" offenses is substantially different from that underlying the "for or because of" offenses. All sections of the bribery statute are aimed at preventing the evil of allowing citizens with money to buy better public service than those without money. The *Evans* court recognized that a lesser mens rea on the part of one who gives a thing of value to a public official does not necessarily translate into a lesser evil inflicted on society, noting that "[e]ven if corruption is not intended by either the donor or the donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the donor by the donee, or the inefficient management of public affairs." 572 F.2d at 480. Supplementation of an official's income causes a deterioration of the political system in the same way as does outright bribery in the narrow sense. Recognizing this, the drafters of the Model Penal Code, which like section 201 separates the offenses listed under the "bribery" heading into those which involve a *quid pro quo* arrangement and those which do not, characterized all of these offenses together as "designed to reach various means by which the integrity of government can be undermined." Model Penal Code Article 240, introductory note (1980).

Like any other form of bribery, income supplementation weakens the trust of the people in their elected representatives which is essential to the functioning of democratic government. As President Kennedy stated in his message to Congress regarding the revision of the bribery laws,

> There can be no dissent from the principle that all officials must act with unwavering integrity, absolute

> impartiality, and complete devotion to public interest. This principle must be followed not only in reality but in appearance. For the basis of effective government is public confidence, and that confidence is endangered when ethical standards falter or appear to falter.

1 Pub. Papers 326 (1961).

The crimes described in paragraphs (b) and (c) are undoubtedly more serious than those described in paragraphs (f) and (g). Arguably, a law which permits the stringent Travel Act penalties to be predicated on a conviction under sections (f) and (g) is overly harsh. But if that is the case, it is the responsibility of Congress to change that law. As the *Perrin* Court noted in adopting an expansive definition of Travel Act bribery rather than the narrow common-law definition, "Congress has clearly stated its intention to include violations of state as well as federal bribery law. Until statutes such as the Travel Act contravene some provision of the Constitution, the choice is for Congress, not the courts." 444 U.S. at 50, 100 S.Ct. at 318.

To suggest in the meantime that Congress intended in drafting the Travel Act to draw a distinction between the types of crimes described under the bribery statute not only runs contrary to the relevant legislative history, but ignores the broad remedial purpose of the Travel Act. It was designed to aid enforcement of a wide range of crimes whose interstate aspect made them difficult to investigate and prosecute by providing "material assistance to the States in combating pernicious undertakings which cross State lines." S.Rep. No. 644, 87th Cong., 1st Sess., 4 (1061) (quoting Attorney General Kennedy); H.R. Rep. No. 966, 87th Cong., 1st Session, 4 (1961) (same), quoted in *United States v. Nardello*, 393 U.S. 286, 292, 89 S.Ct. 435, 534, 538, 21 L.Ed.2d 487 (1969). The *Nardello* court pointed out that "the purpose of the Travel Act was to aid local law enforcement officials." 393 U.S. at 290, 89 S.Ct. at 537.

A primary purpose of the Travel Act was to fight the activities of organized crime. *See United States v. Brecht*, 540 F.2d 45,

49 (2d Cir.1976); *see also* Comment, The Scope of Bribery under the Travel Act, 70 J.Crim.L. & Criminology 337 (1979) (concluding that only activities associated with organized crime should generally be punished under the Travel Act). But as noted by the Court of Appeals in *Perrin*, courts cannot conclude that *only* crimes typically associated with the underworld can be Travel Act predicate crimes. In refusing to draw a distinction in that case between the broad range of crimes punishable on the face of the statute and the narrower category of crimes within the purview of the organized crime activities specifically targeted by Congress, the Fifth Circuit stated, "[w]e genuinely doubt our expertise to make such a determination." *United States v. Perrin*, 580 F.2d 730, 733 (5th Cir.1978).

Nor is there any merit to defendants' contention that since the penalty which can be imposed under the Travel Act is equal to that which can be imposed under sections 201(b) and (c) but greater than the maximum under sections (f) and (g), Congress could not have intended to give the government the power to increase the penalty imposable under the latter by using it as a predicate for a Travel Act count. An additional penalty imposable under the Travel Act is reasonable since a Travel Act conviction requires proof of an additional element beyond the predicate crime itself—use of interstate facilities—which enhances the seriousness of the offense by making the perpetrator more difficult to apprehend. Thus in *Perrin*, the Supreme Court held that commercial bribery in violation of New York state law, which carried a maximum sentence of three months imprisonment, fell within the purview of the Travel Act's bribery provision.

Conclusion

Defendants' motion for a judgement of acquittal notwithstanding the verdict on the convictions under 18 U.S.C. § 1952 is denied.

So ordered.